

2015

**Leslie D. Mower, A11. Individual; Ld . i.il, i.lc, a Utah Limited Liability Company; Ld Ranch, LLC, N Utah Limited Liability Company, Plaintiffs/ Appellants, vs. David R. Shv1pson, an Individual; Landmark Real Estate, Inc., a Utah Corporation; Wood Springs, LLC, a Utah Limited Liability Company; Pheasant Meadows, LLC, a Utah Lirnited Liability Company; Krjstin 1\ 1ackey, an Individual; Dean Mackey, an Individual; And Does 1- 10, Defendants/ Appellee.**

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

#### **Recommended Citation**

Brief of Appellant, *Mower; LD Ranch v Simpson; Landmark*, No. 20150549 (Utah Court of Appeals, 2015).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/3599](https://digitalcommons.law.byu.edu/byu_ca3/3599)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

---0000000---

LESLIE D. MOWER, an individual; LD  
III, LLC, a Utah limited liability  
company; LD RANCH, LLC, a Utah  
limited liability company,

Plaintiffs/Appellants,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a  
Utah corporation; WOOD SPRINGS,  
LLC, a Utah limited liability company;  
PHEASANT MEADOWS, LLC, a Utah  
limited liability company; KRISTIN  
MACKEY, an individual; DEAN  
MACKEY, an individual; and DOES 1-  
10,

Defendants/ Appellee.

20150549-CA  
Utah Supreme Court No. 2150549-CA

District Court Civil No. 100403908

PRIORITY NO.: 15

---

APPELLANTS'  
OPENING BRIEF ON APPEAL

---

Appeal from the Final Judgment of the Fourth District Court,  
Utah County, Provo Division, The Honorable Judge Lynn W. Davis

FILED  
UTAH APPELLATE COURTS  
DEC 23 2015



Craig Carlile (0571)  
**RAY, QUINNEY & NEBEKER, PC**  
86 North University Ave., Suite 430  
Provo, UT 84601  
Telephone: (801) 342-2400

Attorneys for Defendants-Appellees  
David R. Simpson, Landmark Real  
Estate, Inc., Wood Springs, LLC and  
Pheasant Meadows, LLC

Andy V. Wright (11071)  
Aaron R. Harris (4778)  
**DURHAM JONES & PINEGAR, P.C.**  
3301 North Thanksgiving Way, Ste. 400  
Lehi, UT 84043  
Telephone (801) 375-6600

Attorneys for Defendants-Appellees  
Kristin W. Mackey and Dean Mackey

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
**NELSON, SNUFFER, DAHLE &  
POULSEN, P.C.**  
10885 South State  
Sandy, UT 84070  
Telephone: (801) 576-1400

William T. Jennings (8213)  
**LAW OFFICE OF WILLIAM T.  
JENNINGS**  
141 West 900 North  
Springville, UT 84663  
Telephone: (801) 787-9686

Attorneys for Plaintiffs-Appellants Leslie  
D. Mower, LD III, LLC, and LD Ranch,  
LLC

**\* ORAL ARGUMENT REQUESTED**

---

**IN THE UTAH COURT OF APPEALS**

---

---0000000---

LESLIE D. MOWER, an individual; LD	:	
III, LLC, a Utah limited liability	:	Utah Supreme Court No. 2150549-CA
company; LD RANCH, LLC, a Utah	:	
limited liability company,	:	District Court Civil No. 100403908

Plaintiffs/Appellants,

vs.

DAVID R. SIMPSON, an individual;	:	PRIORITY NO.: 15
LANDMARK REAL ESTATE, INC., a	:	
Utah corporation; WOOD SPRINGS,	:	
LLC, a Utah limited liability company;	:	
PHEASANT MEADOWS, LLC, a Utah	:	
limited liability company; KRISTIN	:	
MACKEY, an individual; DEAN	:	
MACKEY, an individual; and DOES 1-	:	
10,	:	

Defendants/ Appellee.

---

**APPELLANTS'  
OPENING BRIEF ON APPEAL**

---

Appeal from the Final Judgment of the Fourth District Court,  
Utah County, Provo Division, The Honorable Judge Lynn W. Davis



Craig Carlile (0571)  
**RAY, QUINNEY & NEBEKER, PC**  
86 North University Ave., Suite 430  
Provo, UT 84601  
Telephone: (801) 342-2400

Attorneys for Defendants-Appellees  
David R. Simpson, Landmark Real  
Estate, Inc., Wood Springs, LLC and  
Pheasant Meadows, LLC

Andy V. Wright (11071)  
Aaron R. Harris (4778)  
**DURHAM JONES & PINEGAR, P.C.**  
3301 North Thanksgiving Way, Ste. 400  
Lehi, UT 84043  
Telephone (801) 375-6600

Attorneys for Defendants-Appellees  
Kristin W. Mackey and Dean Mackey

Denver C. Snuffer, Jr.(3032)  
Steven R. Paul (7423)  
**NELSON, SNUFFER, DAHLE &  
POULSEN, P.C.**  
10885 South State  
Sandy, UT 84070  
Telephone: (801) 576-1400

William T. Jennings (8213)  
**LAW OFFICE OF WILLIAM T.  
JENNINGS**  
141 West 900 North  
Springville, UT 84663  
Telephone: (801) 787-9686

Attorneys for Plaintiffs-Appellants Leslie  
D. Mower, LD III, LLC, and LD Ranch,  
LLC

**\* ORAL ARGUMENT REQUESTED**

## **APPELLANT'S BRIEF**

Appellants, Leslie D. Mower, LD III, LLC, and LD Ranch, LLC, submit this brief in the appeal before this Court.

### **LIST OF ALL PARTIES TO THE PROCEEDING BELOW**

The Plaintiffs-Appellants:

LESLIE D. MOWER, an individual, LD III, LLC, a Utah limited liability company, and LD RANCH, LLC, a Utah limited liability company.

The Defendants-Appellees:

DAVID R. SIMPSON, an individual; LANDMARK REAL ESTATE, INC., a Utah corporation; WOOD SPRINGS, LLC, a Utah limited liability company; PHEASANT MEADOWS, LLC, a Utah limited liability company; KRISTIN MACKEY, an individual; DEAN MACKEY, an individual; and DOES 1-10,



## TABLE OF CONTENTS

LIST OF ALL PARTIES TO THE PROCEEDING BELOW .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
JURISDICTION OF APPELLATE COURT .....	1
ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION IN THE RECORD .....	1
RULES AND REGULATIONS APPLICABLE TO APPEAL .....	6
STATEMENT OF THE CASE .....	6
Nature of the Case .....	6
Course of Proceedings and Disposition Below .....	7
Facts established in the District Court Record .....	12
SUMMARY OF ARGUMENTS .....	16
ARGUMENT .....	17
I.    The Trial Court Erred When it Struck the Mower Declaration as Inadmissible, Finding it Was Contradicted by Her Deposition Testimony or Contained Inadmissible Speculation or Conclusions, Without Giving Any Reasoning or Support .....	17
A. Power of Attorney .....	19
B. Opinions and Conclusions .....	20
II.   The Trial Court Erred When it Granted Summary Judgment to Simpson and Deemed All of Simpson Defendants' Facts Uncontroverted Based on a Hyper- Stringent Reading of Rule 7(c)(3), Utah Rules of Civil Procedure .....	22

III.	It was Error to Find that the Statute of Limitations Had Run on Plaintiffs' Claims .....	28
IV.	The Trial Court Abused its Discretion When it Denied Plaintiffs' Motion for Reconsideration When the Case Was Not Fully Resolved and the Court Record Demonstrated Genuine Issues of Material Fact .....	32
V.	The Trial Court Erred in Granting the Mackey Defendants Summary Judgment Based Upon Law of the Case .....	34
CONCLUSION .....		36
CERTIFICATE OF COMPLIANCE .....		37
CERTIFICATE OF SERVICE .....		38
ADDENDUM TABLE OF CONTENTS .....		39



## TABLE OF AUTHORITIES

### Court Cases and Other Authorities

<i>Amjacs Interwest, Inc., v. Design Associates</i> , 635 P.2d 53 (Utah 1981) .....	27, 32
<i>Bekins Bar V Ranch v. Huth</i> , 664 P.2d 455 (Utah 1983) .....	27
<i>Best v. Daimler Chrysler Corp.</i> , 2006 UT App 304, 141 P.3d 624 .....	21
<i>Bluffdale City v. Smith</i> , 2007 UT App 25, 156 P.3d 175 .....	3, 5
<i>Brower v. Brown</i> , 744 P.2d 1337 (Utah 1987) .....	27, 28
<i>Cheney v. Rucker</i> , 14 Utah 2d 205, 381 P.2d 86 (1963) .....	27
<i>Christiansen v. Union Pacific Railroad</i> , 2006 UT App 180, 136 P.3d 1266 .....	28
<i>Drysdale v. Ford Motor Co.</i> , 947 P.2d 678 (Utah 1997) .....	26
<i>Fennell v. Green</i> , 2003 UT App 291, 77 P.3d 339 .....	25, 26
<i>Fisher v. Davidhizar</i> , 2011 UT App 270, 263 P.3d 440 .....	18
<i>Ford v American Express Fin. Advisors</i> , 2004 UT 70, 98 P.3d 15 .....	3, 5
<i>Goodnow v. Sullivan</i> , 2002 UT 21, 44P.3d 704 .....	27
<i>Housely v. Anaconda Co.</i> , 427 P.2d 390 (Utah 1967) .....	26, 33
<i>IHC Health Services, Inc. v. D &amp; K Management</i> , 2008 UT 73, 196 P.3d 588 .....	18, 33
<i>Jennings Investment, LC v. Dixie Riding Club, Ind.</i> , 2009 UT App 119, 208 P.3d 1077 .....	3, 4, 5, 24, 25
<i>Jensen v. IHC Hospitals, Inc.</i> , 2003 UT 51, 82 P.3d 1036 .....	29
<i>Lund v. Hall</i> , 938 P.2d 285 (Utah 1997) .....	4
<i>Messenger v. Anderson</i> , 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152 (1912) .....	34

<i>Morris v. Farnsworth Motel</i> , 259 P.2d 297 (Utah 1953) . . . . .	32
<i>Murdock v. Springville Mun. Corp.</i> , 1999 UT 39, 982 P.2d 65 . . . . .	1
<i>Orvis v. Johnson</i> , 2008 UT 2, 177 P.3d 600 . . . . .	32
<i>Plumb v. State</i> , 809 P.2d 734 (Utah 1990) . . . . .	34
<i>Richardson v. Grand Central Corp.</i> , 572 P.2d 395 (Utah 1977) . . . . .	34
<i>Ron Shepherd Insurance, Inc. v. Shields</i> , 882 P.2d 650 (Utah 1994) . . . . .	19
<i>Russell Packard Dev., Inc. v. Carson</i> , 2005 UT 14, 108 P.3d 741 . . . . .	31
<i>Shipman v. Evans</i> , 2004 UT 44, 100 P.3d 1151 . . . . .	33
<i>Spears v. Warr</i> , 2002 UT 24, 44 P.3d 742 . . . . .	4
<i>State v. O'Neil</i> , 848 P.2d 694 (Utah Ct. App.), <i>cert. denied</i> , 859 P.2d 585 (Utah 1993) . . . . .	33, 34
<i>State v. Pena</i> , 869 P.2d 932 (Utah 1994) . . . . .	2
<i>Suarez v. Grand County</i> , 2012 UT 72, 296 P.3d 688 . . . . .	26
<i>Thurston v. Box Elder County</i> , 892 P.2d 1034 (Utah 1995) . . . . .	35
<i>Timm v. Dewsnup</i> , 851 P.2d 1178 (Utah 1993) . . . . .	27, 33
<i>Timm v. Dewsnup</i> , 921 P.2d 1381 (Utah 1996) . . . . .	4
<i>Transamerica Title Ins. Co. v. United Resources, Inc.</i> , 471 P.2d 165 (Utah 1970) . . . . .	27
<i>Uintah Basin Med. Ctr. v. Hardy</i> , 2008 UT 15, 179 P.3d 786 . . . . .	32
<i>USA Power, LLC v. PacifiCorp</i> , 2010 UT 31, 235 P.3d 749 . . . . .	27
<i>Wardley Better Homes &amp; Gardens v. Cannon</i> , 2002 UT 99, 61 P.3d 1009 . . . . .	29
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982) . . . . .	27



### **Constitutions, Statutes, and Regulations**

Utah Const., Article VIII, § 5 .....	1
Utah Code Ann. § 78A-3-102(3)(j) (2009, as amended) .....	1
Utah Code Ann. § 78A-3-102(4) .....	1
Utah Code Ann. § 78A-4-103(2)(j) .....	1
Utah Code Ann. § 78B-2-114 (2015) .....	28
Utah Code Ann. § 78B-2-305(3) .....	31
Utah Code Ann. § 78-12-47 (1987) .....	28
URCP 56(c) .....	6, 21, 22, 26, 32
URCP 7(c)(3) .....	<i>passim</i>
Utah Rules of Judicial Administration 4-501(2)(B) .....	25

### **Other Sources**

18 Charles A. Wright et al., <i>Federal Practice and Procedure</i> § 4478 (1981) .....	34, 35
1B James W. Moore et al., <i>Moore's Federal Practice</i> P 0.404 .....	34
1B J. Moore, J. Lucas & T. Currier, <i>Moore's Federal Practice</i> para. 0.404[4.-1] (2d ed. 1988) .....	34

## **JURISDICTION OF APPELLATE COURT**

The jurisdiction of all appellate courts "shall be provided by statute."<sup>1</sup> Section 78A-4-103(2)(j) of the Utah Code, provides "[t]he Supreme Court has appellate jurisdiction..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]"<sup>2</sup> This is an appeal from a summary judgment, the final judgment of the Fourth District Court in a civil matter, and although it has original appellate jurisdiction, the Supreme Court has transferred this matter to the Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4) which provides that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

## **ISSUES PRESENTED FOR REVIEW**

A. Whether the trial court erred when it granted Defendants' abandoned and never fully briefed Motion to Strike the Declaration of Leslie Dee Mower, without giving any reasoning or support for its conclusion that the declaration was contradicted by prior deposition testimony, thereby discarding many disputed facts?

### **Standard of Review:**

"There is no established standard for reviewing a decision striking affidavits." *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 25, 982 P.2d 65. "However, since an affidavit is simply a method of placing evidence of a fact before the court, we look to our prior decisions regarding the admission of evidence more generally." *Id.* "The standard of

---

<sup>1</sup> Utah Const., Article VIII, § 5.

<sup>2</sup> Utah Code Ann., § 78A-3-102(3)(j) (2009, as amended).



review for the admission of evidence varies depending on the type of evidence at issue." *Id.* "For example, in *State v. Pena*, 869 P.2d 932, 938 (Utah 1994), we stated that the decision to admit evidence under Utah Rule of Evidence 403 was on the 'broad end of the [discretion] spectrum' like 'other rulings on the admission of evidence [that] also generally entail a good deal of discretion,' but in cases involving other categories of evidence, such as the admission of evidence that might violate the Fourth Amendment, 'we narrow the [discretion granted] considerably for policy reasons.' *Id.* "In civil cases such as the present one, where the evidence sought to be introduced does not raise concerns of the type that have produced heightened standards of sensitivity, a trial court decision to admit evidence is reviewed under a broad grant of discretion." *Id.*

**Preservation in the record:**

The pleadings and declarations on file with the court demonstrate there is no basis for striking the declaration of Leslie Dee Mower. ("Leslie"). Nothing in her declaration is contradicted by her earlier deposition. (See Declaration of Leslie Dee Mower (R.485), Motion to Strike (R.495), and Opposition thereto (R.613). No Reply Memorandum was filed by the Simpson Defendants, no Request for Decision was filed by the Simpson Defendants and no hearing was held on the motion. In effect the motion was abandoned after Plaintiffs' opposition.

B. Whether the trial court erred in granting summary judgment when it deemed all of the Simpson Defendants' facts to be uncontested, when they were in fact disputed?

**Standard of Review:**

"We review a district court's grant of summary judgment for correctness affording no deference to the district court." *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 5, 156 P.3d 175 (citing *Ford v American Express Fin. Advisors*, 2004 UT 70, ¶ 21, 98 P.3d 15). "[W]e must determine whether the district court abused its discretion in admitting as uncontroverted the facts Plaintiffs submitted ...." *Jennings Investment, LC v. Dixie Riding Club, Ind.*, 2009 UT App 119, ¶ 6, 208 P.3d 1077.

**Preservation in the record:**

The pleadings and declarations on file with the court contain genuine issues of material fact regarding whether Ken Dolezsar ("Dolezsar") was acting within the scope of his agency authority when working with Simpson; whether Simpson exceeded the scope of any authority he was given and violated his fiduciary duty when he conveyed over 31 acres of property paid for by Plaintiffs to Mackeys; and whether the statute of limitations has run on Plaintiffs' claims for relief. (See Opposition to Summary Judgment (R.367); Declaration Paul Reeb (R.384); Declaration Leslie Dee Mower (R.485); and Motion for Reconsideration (R.823) with supporting references to record.)

C. Whether the trial court erred in finding the statute of limitations ran on Plaintiffs' claims?

**Standard of Review:**

"We review a district court's grant of summary judgment for correctness affording no deference to the district court." *Bluffdale City*, 2007 UT App 25, ¶ 5 (citing *Ford v American*

*Express Fin. Advisors*, 2004 UT 70, ¶ 21, 98 P.3d 15). "The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which we review for correctness." *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742. "[W]e must determine whether the district court abused its discretion in admitting as uncontroverted the facts Plaintiffs submitted ...." *Jennings Investment, LC v. Dixie Riding Club, Ind.*, 2009 UT App 119, ¶ 6, 208 P.3d 1077.

**Preservation in the record:**

The pleadings and declarations on file with the court demonstrate there are genuine issues of material fact regarding whether Dolezsar was acting within the scope of his agency authority such that his knowledge should be imputed to Leslie as a matter of law and, therefore, whether the statute of limitations has run on Plaintiffs' claims for relief. (See Opposition to Summary Judgment (R.367); Declaration Paul Reeb (R.384); Declaration Leslie Dee Mower (R.485); Motion for Supplemental Briefing (R.673); and Motion for Reconsideration (R.823) with supporting references to record.)

D. Whether the trial court abused its discretion by denying Plaintiffs' motion for reconsideration when the case involved other claims and parties which were not resolved, and the court record contained genuine issues of material fact?

**Standard of Review:**

A trial court's "denial of a motion to reconsider summary judgment [is reviewed] under rule 60(b) of the Utah Rules of Civil Procedure for abuse of discretion." *Lund v. Hall*, 938 P.2d 285, 287 (Utah 1997) (citing *Timm v. Dewsnup*, 921 P.2d 1381, 1386 (Utah 1996)).

**Preservation in the record:**

The pleadings and declarations on file with the court demonstrate the motion for reconsideration was well taken to correct the court's error in granting summary judgment in light of the many genuine issues of material fact the court disregarded when it concluded that Rule 7 of the Utah Rules of Civil Procedure required the Defendant Simpson's facts deemed admitted despite Plaintiffs' opposition and declarations in the court file. (See Opposition to Summary Judgment (R.367); Declaration Paul Reeb (R.384); Declaration Leslie Dee Mower (R.485); Motion for Supplemental Briefing (R.673); and Motion for Reconsideration(R.823) with supporting references to record.)

E. Whether the trial court erred in granting the Mackeys' summary judgment motion based on the prior grant of Simpson Defendants' summary judgment motion, with genuine issues of material fact the court disregarded only for technical reasons?

**Standard of Review:**

"We review a district court's grant of summary judgment for correctness affording no deference to the district court." *Bluffdale City*, 2007 UT App 25, ¶ 5 (citing *Ford v American Express Fin. Advisors*, 2004 UT 70, ¶ 21, 98 P.3d 15). "[W]e must determine whether the district court abused its discretion in admitting as uncontroverted the facts Plaintiffs submitted ...." *Jennings Investment, LC v. Dixie Riding Club, Ind.*, 2009 UT App 119, ¶ 6, 208 P.3d 1077.

**Preservation in the record:**

The pleadings and declarations on file with the court reveal genuine issues of material fact regarding whether Dolezsar was acting within the scope of his agency authority when working with Simpson; whether Simpson violated his fiduciary duty or exceeded the scope of his authority when he conveyed over 31 acres of property Plaintiffs purchased to Mackeys; and whether the statute of limitations has run on Plaintiffs' claims for relief. (See Opposition to Mackey Summary Judgment (R.574); Declaration Paul Reeb (R.384); Declaration Leslie Dee Mower (R.485); Motion for Supplemental Briefing (R.673); and Motion for Reconsideration (R.823) with supporting references to record.)

**RULES AND REGULATIONS APPLICABLE TO APPEAL**

Rule 7, Utah Rules of Civil Procedure

Rule 56, Utah Rules of Civil Procedure

**STATEMENT OF THE CASE****Nature of the Case:**

The trial court granted summary judgment in favor of Defendants based on an oddly contradictory approach to the Utah Rules of Civil Procedure. On the one hand the trial court used a hyper-lax application of the rules to strike the Declaration of Leslie Dee Mower, yet on the other hand used a hyper-stringent interpretation of former Rule 7 of the Utah Rules of Civil Procedure to ignore disputed facts. These inconsistencies share only the purpose of concealing disputed facts which would have prevented summary judgment.

The trial court's error in striking the Declaration of Leslie Dee Mower led to a series of errant subsequent decisions that should be corrected in this appeal. The trial court refused to consider matters briefed as part of summary judgment, supported by declaration, and reconfirmed in related motions, when it determined there were no genuine issues of material fact. The trial court considered only Defendants' statement of facts and wrongly concluded Plaintiffs' citation to the record should be discarded under former Rule 7 of the Rules of Civil Procedure. The lower court deemed Defendants' statement of facts uncontroverted, but opposing memorandum and declarations contained disputed issues of material fact.

The hyper-stringent interpretation of former Rule 7 adopted by the trial court ignores that every requirement of the Rule was substantially met. There was an obvious dispute of facts. When the trial court was invited to correct its error in a motion to reconsider, it declined. A motion to reconsider was filed prior to a ruling on Mackeys' motion for summary judgment.

**Course of Proceedings and Disposition Below:**

In 2005, Plaintiffs wanted to purchase real property in Hobbie Creek Canyon in Utah County for an equestrian center. David Simpson (together with Defendants Landmark Real Estate, Inc., Wood Springs, LLC and Pheasant Meadows, LLC, referred to as "Simpson" or "Simpson Defendants") is and was at all relevant times, a real estate agent and/or real estate broker licensed by the State of Utah. Simpson worked with Plaintiff Leslie Dee Mower's now deceased husband, Dolezsar, to identify and buy property for an equestrian center.



As Defendants Dean and Kristin Mackey's (the "Mackeys ") real estate agent, Simpson had previously sold them unbuildable property in Hobble Creek Canyon. Their property was unbuildable because it was bisected by Hobble Creek Canyon Road and totaled only 49 acres. Zoning required a minimum lot size of 50 acres and all the acreage needed to be contiguous for permission to build a home. Mackeys were threatening to sue Simpson at the time Leslie bought her land.

Simpson used Plaintiffs' funds to purchase property in Hobble Creek Canyon for the equestrian center, but he titled the properties in the name of his entities. Then two years later he deeded some of the properties to Plaintiffs. However, he gave 31 acres purchased with Leslie's funds to Mackeys to avoid a lawsuit from Mackeys against him.

Simpson, as a fiduciary<sup>3</sup>, used Leslie's funds to purchase 31 acres adjacent to the Mackey parcel. Then, without her permission or knowledge, conveyed the 31 acres to Mackeys to protect himself against their threatened lawsuit. The conveyance to Mackeys made their property eligible for a building permit because with the added acres it met the 50 acre minimum required by zoning. Mackeys then built a home. Mackays admit Leslie's funds were used to purchase the property Simpson gifted to them. Mackays admit they didn't pay for the property. Mackays concede that 12-14 unneeded acres, in excess of the 50-acre lot size, must be reconveyed to Plaintiffs.

With the exception of the 31 acres used to solve his own liability, Simpson deeded the remaining properties to Plaintiffs for the equestrian center on July 17, 2007. Dolezsar was

---

<sup>3</sup> Simpson Defendants refer to Simpson's role as a "nominee " - but even so, he acted as a fiduciary in taking Plaintiffs' money to purchase and hold property in trust for her.

killed on November 15, 2007. Following Dolezsar's death, Leslie learned that 31 acres of her property had been diverted without permission to Mackeys.

Plaintiffs filed a complaint on November 12, 2010, seeking damages against Simpson and Mackeys for fraud, misrepresentation, breach of fiduciary duty, conversion, unjust enrichment, conspiracy and breach of contract. (R.1).

On March 11, 2014, the Simpson Defendants filed a Motion for Summary Judgment requesting the trial court dismiss all claims against them. (R.224). Plaintiffs filed their Opposition to the Simpson Defendants' Motion for Summary Judgment on April 10, 2014. (R.367). In support of their opposition, Plaintiffs filed the Declaration of Paul Reeb ("Reeb Declaration") (R.384) and the Declaration of Leslie Dee Mower ("Mower Declaration") (R.485). Both declarations contain facts that contest Simpson's claims.

On April 15, 2014, Mackeys also filed a Motion for Summary Judgment (R.393), requesting the trial court dismiss all claims against them. The Mackeys' Motion for Summary Judgment incorporated by reference most of the facts in Simpson's Motion for Summary Judgment. *Id.*

On April 23, 2014, Simpson filed a Motion to Strike the Mower Declaration (R.495), claiming it contradicted her earlier deposition testimony and contained unsubstantiated conclusions and opinions. On May 13, 2014, Plaintiffs filed an Opposition to the Motion to Strike the Mower Declaration (R.513). In their opposition, Plaintiffs showed there were no inconsistencies between Leslie's deposition testimony and her declaration. The Simpson Defendants never responded to Plaintiffs' Opposition, never filed a Request to Submit their

Motion to Strike for Decision, and therefore abandoned their motion. The trial court never held oral argument on the Motion to Strike the Mower Declaration and never issued a specific ruling on the Motion to Strike. The Motion to Strike was filed, opposed and then abandoned. (*See* Record generally from April 23, 2014 to conclusion).

On May 1, 2014, Simpson filed a Reply Memorandum in Support of Motion for Summary Judgment. (R.533). On May 9, 2015, Plaintiffs filed their opposition to the Mackey Defendants' Motion for Summary Judgment. (R.574).

On May 14, 2014, the trial court held a Pretrial Conference. (R.619). At that conference, the trial court held unscheduled oral arguments on Simpson's Motion for Summary Judgment. The trial court had questions regarding two documents (Power of Attorney and Prenuptial Agreement) referred to by Simpson but which were not attached to Simpson's Memorandum. The court requested those two documents be submitted. In response, on May 19, 2014, Plaintiffs submitted their Memorandum and Exhibits Requested by the Court. (R.620). On May 29, 2014 Plaintiffs also filed a Motion for Supplemental Briefing on Summary Judgment to include additional relevant facts from the depositions of Simpson and Dean Mackey. (R.673). On May 30, 2014, Mackeys filed their Reply Memorandum in Support of Motion for Summary Judgment. (R.728). On June 3, 2014, Simpson filed a Response to the Memorandum and Exhibits Requested by the Court. (R.769). Plaintiffs filed a Reply Memorandum on the Memorandum and Exhibits Requested by the Court on June 12, 2014. (R.776).<sup>4</sup>

---

<sup>4</sup>The Power of Attorney was given more than a year following the events in this dispute, and therefore could not support the Simpson Defendants' argument. (R.624-630.)

On June 18, 2014, Simpson filed an Opposition to Plaintiffs' Motion for Supplemental Briefing on Summary Judgment. (R.783). Plaintiffs filed their Reply on June 25, 2014. (R.795).

On August 21, 2014, without further argument, the trial court issued its Ruling on Simpson's Motion for Summary Judgment and Order (R.808) in which it granted Simpson summary judgment on all claims.<sup>5</sup> In the Ruling and Order, the trial court found Plaintiffs failed to strictly comply with the requirements of Rule 7 of the Utah Rules of Civil Procedure, finding that "Plaintiffs failed to properly dispute any of the undisputed facts" set forth by Simpson. *Id.* at p. 9. Therefore, all of the facts offered by Simpson were deemed admitted and the trial court refused to consider any of the facts established by Plaintiffs.

Although the Motion to Strike the Mower Declaration was not fully briefed, not submitted for decision, and not separately considered by the trial court, the Ruling and Order by the trial court found the Mower Declaration was "inadmissible because it consists of nothing but statements directly contradicted by her prior deposition testimony and unsubstantiated opinions and conclusions." *Id.* The trial court did not specifically explain which statements contradicted Leslie's prior deposition testimony, how they contradicted her prior deposition testimony or which statements were unsubstantiated opinions and conclusions. The trial court also ignored the Reeb Declaration, which alone created genuine issues of material fact sufficient to defeat summary judgment, and ignored the Motion for

---

<sup>5</sup>The Ruling was prepared by Simpson and was adopted by the trial court.

Supplemental Briefing that cited facts showing additional dispute law and facts preventing summary judgment.

On September 4, 2014, Plaintiffs filed a Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment. (R.823). Simpson filed an opposition to Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment on October 6, 2014. (R.948). Plaintiffs filed a Reply Memorandum in Support of Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment on October 20, 2014. (R.977). The trial court held oral argument on the motion to reconsider (R.993) and on April 7, 2015 issued an Order Denying Plaintiffs' Motion to Reconsider. (R.997).

On September 16, 2014, and again on April 22, 2015, the trial court heard oral argument on Mackeys' Motion for Summary Judgment (R.944, 1000) and on June 23, 2015 it issued a written ruling, dismissing Plaintiffs' remaining claims against Mackeys based on the "law of the case." (R.1126). Once again the trial court ignored facts cited by Plaintiffs in opposition to summary judgment.

On July 6, 2015, Plaintiffs filed a timely Notice of Appeal. (R.1160).

**Facts established in the District Court Record:**

1. In 2005, Leslie wanted to purchase enough property in Hobble Creek Canyon for an equestrian center. Ruling and Order on Simpson Def. Motion for Summary Judgment, page 10. (R.817).

2. Dolezsar worked with Simpson to acquire enough property for the equestrian center. *Id.*

3. Simpson never had any conversations with Leslie regarding the purchase and acquisition of any of the properties assembled by Simpson and Dolezsar for her equestrian center. *Id.*

4. Leslie never authorized or instructed Simpson to use her funds to acquire title to real property in his own name or the name of an entity he owned or controlled. Decl. Leslie Mower, ¶ 4. (R.486).

5. On or about March 5, 2005, Simpson purchased 268 acres of land in Hobble Creek Canyon known as the "Crandall Parcel" for the equestrian center, taking title in the name of Wood Springs, LLC, as a fiduciary.<sup>6</sup> Ruling and Order. (R.817).

6. On or about February 15, 2006, Simpson purchased the "Storrs Parcel" in Hobble Creek Canyon for the equestrian center, taking title in the name of Wood Springs, LLC, as fiduciary. *Id.*

7. In March of 2006, Simpson approached Paul Reeb ("Reeb") of Hobble Creek Investments LLC about selling property in which it held a right of first refusal based on a contract with the Thornhills to purchase the parcel known as the "Thornhill Parcel." Decl. Paul Reeb, ¶ 5 (R.385).

---

<sup>6</sup> Simpson acted as a real estate agent in each of the property transactions—imposing a fiduciary duty. Simpson disputed he was a real estate agent and instead claimed he was acting as a "nominee" (and the trial court adopted the same nomenclature)—which likewise imposes a fiduciary duty. Since both sides assign a fiduciary role to Simpson, the determination of whether he acted as fiduciary real estate agent or fiduciary nominee is not material.



8. Reeb explained that prior to Simpson offering to purchase the Thornhill Parcel from Hobble Creek Investments LLC, it had acquired a right of first refusal to purchase the Thornhill Parcel in the amount of \$1,500,000.00. *Id.*

9. Hobble Creek Investments LLC agreed to exercise its right of first refusal and purchase the Thornhill Parcel, then immediately convey it to Simpson (or his assigns) for payment of \$1,750,000.00 and approximately 10 acres of property that adjoined its current holdings in the canyon. *Id.* (R.385-386).

10. Hobble Creek Investments LLC did not express a preference for any particular parcel for the 10 acres, it merely wanted approximately 10 acres contiguous to its other property in the canyon as a buffer, to prevent construction or homes or other structures near its property. *Id.* Therefore, 10 acres from any of the property acquired by Plaintiffs could have readily satisfied the Hobble Creek Investments LLC condition with no need to involve Mackeys. Decl. Paul Reeb, ¶¶ 9, 10 and 11 (R.385).

11. On or about April 27, 2006, Simpson purchased the "Thornhill Parcel" in Hobble Creek Investments LLC for the equestrian center, taking title in the name of Wood Springs, LLC. Ruling and Order (R.819 ¶ 13).

12. On April 27, 2006, Simpson conveyed 6.5 acres of the Crandall Parcel to Hobble Creek Canyon, LLC. *Id.* ¶ 12(d).

13. On or about July 3, 2006, Simpson purchased the "Olsen Parcel" in Hobble Creek Canyon for the equestrian center, taking title in the name of Pheasant Meadows, LLC, as nominee. *Id.* (R.817).

14. Simpson conveyed the Storrs Parcel to Mackeys on August 24, 2006, thereby making it unavailable to Leslie and for her equestrian center. *Id.* (R.818).

15. Simpson conveyed the Olsen Parcel to Mackeys on August 24, 2006, thereby making it unavailable to Leslie and for her equestrian center. *Id.* (R.819).

16. Mackeys conveyed a Right of Use Easement to Hobble Creek Investments LLC on August 27, 2006. *Id.*

17. On August 8, 2006, Simpson, on behalf of Wood Springs, LLC as fiduciary, along with the Mackeys, executed an agreement (the "Reconveyance Agreement") in which they agreed to convey to Wood Springs, LLC (and theoretically eventually to Plaintiffs) 12-14 acres of the property conveyed to the Mackeys not necessary for a building permit on the remaining Mackey Parcel, once their property was combined with the Storrs and Olsen Parcels. *Id.*

18. On July 17, 2007, Wood Springs conveyed all of the Thornhill Parcel and the Crandall Parcel, less the 6.5 acres conveyed to Hobble Creek Investments LLC to LD Ranch, LLC. *Id.*

19. On November 15, 2007, Dolezsar was killed. Mower Declaration ¶ 9 (R.486).

20. Plaintiffs have never agreed or accepted the Reconveyance Agreement proposed by Simpson and Mackeys. Ruling and Order (R.819).

21. There is no written support for Simpson's allegations that Dolezsar instructed or authorized Simpson to acquire property in Hobble Creek Canyon in his own name or in the name of an entity he owned or controlled. Simpson Depo. pp 49, 69. (R.829).

22. The explanation for why the Storrs and Olsen Parcels were conveyed to Mackeys as made by Dean Mackey in his deposition contradicts the explanation for the transaction in Simpson's motion for summary judgment. See Motion for Supplemental Briefing (R.676-727). Dean Mackey claims the property was "compensation" for his services.

### **SUMMARY OF ARGUMENTS**

This appeal is pursued to correct the trial court's error in failing to consider all the facts, pleadings and declarations in the Court Record while granting summary judgment. A trial court has the responsibility to consider all facts in the Court Record before determining whether there are genuine issues of material fact.

The trial court's errors arise from its refusal to consider facts submitted and referred to by Plaintiffs in opposition to Simpson's motion for summary judgment. The Mower Declaration was filed seven (7) days after Plaintiffs' memorandum in opposition to summary judgment. Therefore, the memorandum did not cite to the declaration. However, the facts in the declaration are in the memorandum and were before the trial court and argued by Defendants. The Reeb Declaration was cited in Plaintiffs' memorandum in opposition to summary judgment. The Mower Declaration was cited in Plaintiffs' later motions, including the motion for supplemental briefing (R.673) and a motion for reconsideration (R.823). The declaration was known to and understood by opposing counsel and the trial court and was referred to in oral argument by all the parties.

The trial court erred in applying a hyper-lax approach to the Rules of Civil Procedure when striking the Mower Declaration, based upon Simpson's unsupported (and untrue) claim the declaration contradicted her previous deposition testimony—an assertion never proven. The motion to strike was never fully briefed or properly decided by the trial court. It made no findings showing the alleged contradictions, hearsay or the necessity to exclude facts. The trial court simply adopted Simpson's unsupported argument and concluded the declaration was somehow contradictory and conclusory, then disregarded it. Thereafter, the trial court erred when it granted summary judgment to Defendants when the Court Record demonstrated well-documented contested issues of fact, properly pled and cited in the record. Subsequent filings cured any theoretical defects in the original opposition. Because of its errors, the trial court wrongly decided the statute of limitations ran on Plaintiffs' claims. The trial court erred in denying Plaintiffs' motion for reconsideration when there was no final decision in the case, the Court Record contained genuine issues of material fact, and the trial court applied a hyper-stringent reading of the rules to support its findings of undisputed fact. The trial court erred in granting the Mackey Defendants' summary judgment motion based upon an erroneous application of the "law of the case" doctrine.

### **ARGUMENT**

**I. The Trial Court Erred When it Struck the Mower Declaration as Inadmissible, Finding it Was Contradicted by Her Deposition Testimony or Contained Inadmissible Speculation or Conclusions, Without Giving Any Reasoning or Support.**

The trial court treated the Mower Declaration as part of the record it was required to consider. However, to remove it as an obstacle to summary judgment, as part of its Ruling

and Order on Summary Judgment (R.808), the trial court found the Mower Declaration was inadmissible, apparently relying on the Simpson Defendants' Motion to Strike. (R.495). Without explanation, the trial court determined Leslie's declaration contradicted her earlier deposition testimony and contained inadmissible speculation or conclusions. (R.816). This constituted a hyper-lax application of the rules for an issue not fully briefed, never submitted for decision, and never discussed in specific findings or conclusions explaining why the declaration was inadmissible.

Simpson's motion to strike the Mower Declaration was riddled with contradictions, unsubstantiated opinions, and conclusions. (R.496). Plaintiffs opposed the motion, showing the Mower Declaration was not inadmissible and was consistent with her deposition testimony. (R.613-616). Thereafter Simpson did not respond or submit the motion for decision. In effect, Simpson abandoned the motion to strike. *See* Record on Appeal (R.495-821). Simpson apparently concluded there was no basis to strike the Mower Declaration and therefore failed to fully brief the issue.

The statements in the declaration are admissible. Nothing contradicted Leslie's deposition testimony. Even if the trial court found contradictions, it could not properly weigh evidence nor determine credibility in summary judgment proceedings. *Fisher v. Davidhizar*, 2011 UT App 270, ¶ 15, 263 P.3d 440; *IHC Health Services v. D & K Management*, 2008 UT 73, ¶ 18, 196 P.3d 588 (A district court is precluded from granting summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case."). "Affidavits and

depositions submitted in support of and in opposition to a motion for summary judgment may be used only to determine whether a material issue of fact exists, not to determine whether one party's case is less persuasive than another's or is not likely to succeed in a trial on the merits." *Ron Shepherd Insurance, Inc. v. Shields*, 882 P.2d 650, 655 (Utah 1994) (citations omitted).

The Simpson Defendants' objection to the declaration focused on two major points:

**A. Power of Attorney.** In the motion for summary judgment, Simpson argued that Dolezsar's actions bound Leslie because he held a power of attorney. However, the Power of Attorney was not signed until January 10, 2007, well after the real property transactions involved in this dispute. (R.624-630). In her deposition, Leslie testified she held onto the power of attorney until March 2007. Mower Deposition, p. 103. (R.889).

In their motion for summary judgment, and specifically during the hearing on May 14, 2014, Simpson argued the general power of attorney given to Dolezsar by Leslie authorized Dolezsar to manage whatever affected Leslie. (Simpson Defendants' Reply Memorandum, p.4) (R.536). Simpson argued that since Dolezsar had a general power of attorney, all the transactions done by Simpson under his instruction were authorized by Leslie. (R.1189-1190). This was the linchpin of the Defendants' argument for summary judgment. (R.1192).

Leslie's declaration explains she "never authorized or instructed Ken Dolezsar to have David Simpson title property in David Simpson's name or in the name of an entity he owned or controlled." (Mower Declaration ¶ 5 (R.486)). This is not contradicted by her deposition testimony nor contrary to the subsequent "power of attorney" given Dolezsar the following



year. Furthermore, the statement that Leslie "did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007", is likewise true and not contradicted by the power of attorney or the deposition testimony. Mower Deposition pages 85, 89 and 90. (R.884-888). The Power of Attorney provides no basis to strike the Mower Declaration.

**B. Opinions and Conclusions:** Paragraphs 10 and 11 of the Mower Declaration were not challenged as a contradiction of her deposition testimony. Simpson Defendants objected to these paragraphs on the factual basis that "[a]ll of the properties that are the subject of this lawsuit were transferred to Mower's entity...." (Simpson Memorandum in Support of Motion to Strike, p. 6 (R.503). Simpson argues the statement cannot be the basis of fraud because Leslie did not rely on the statement. *Id.* at 7(R.504). Simpson failed to support that argument with any citation to the record.

Paragraph 11 of the Mower Declaration states "[t]he representation [of Simpson in paragraph 10 of the Mower Declaration] is untrue because Simpson did not convey to me or to any of the Plaintiffs the Storrs' Parcel or the Nelson [Olsen] Parcel." (R.487). Simpson's objection was based on Leslie's deposition testimony, yet it does not even quote the deposition:

The Storrs and Olsen parcels were purchased with funds from the joint account of Mr. Dolezsar and Mower on checks signed by Mr. Dolezsar. *Id.* [Complaint and Exhibits 20-22 thereto] Those properties were traded to the Mackeys (the Mackeys had previously purchased the Nelson Parcel, see ¶ 6 above) who in turn transferred a portion of their property to Hobbles Creek Investments LLC as part of the purchase price for the Thornhill Parcel where

Mower built her equestrian center. Whether acquired by purchase or trade, the properties were acquired and transferred to Mower and there is nothing false about the alleged statement.

Simpson Memorandum in Support of Motion to Strike, pages 7-8. (R.504-505).

The conflict between the Mower Declaration (together with the Motion for Supplemental Briefing (R.676)) and Simpson Defendants' allegations create a question of material fact about the Mackey real property transactions precluding summary judgment. *See Best v. Daimler Chrysler Corp.*, 2006 UT App 304, ¶ 10, 141 P.3d 624 ("It is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence, and it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.").

Nothing in Simpson's filings show there was a contradiction between the Mower Declaration and her deposition testimony, nor showing any examples of a conclusory statement, opinion, or speculation. Instead Simpson's filings show only factual disputes. Therefore, genuine issues of material fact exist concerning whether Simpson as fiduciary appropriately conveyed all the property he purchased with Plaintiffs' funds. Defendants argue he did. Plaintiffs submitted a declaration that he did not. Ergo, there is a dispute of fact precluding summary judgment.<sup>7</sup> *See* URCP 56(c).

Rule 56 explains supporting or opposing affidavits (which includes declarations upon oath, under Utah Code Ann. § 78B-5-705(1)) are to be made on personal knowledge and

---

<sup>7</sup> Additionally, with the Motion for Supplemental Briefing (R.673) Plaintiffs showed the Mackey explanation for receiving the Storrs and Olsen parcels contradicts the explanation in the Simpson motion for summary judgment. (R.676-727). This also fell on deaf ears in the trial court.

shall set forth admissible facts. Leslie's declaration complies with Rule 56. Leslie testified to specific facts showing a genuine issue for trial. Simpson conveyed property to Mackeys that Leslie paid for to acquire for herself. Leslie stated "Simpson represented to me and my lawyers, on or after July 17, 2007, that he had transferred all of the property to LD Ranch that he acquired in Hobbie Creek Canyon with my personal funds or LD III's funds." (Mower Declaration ¶ 10 (R.487)). That is a statement of fact that is not contradicted by Defendants or by Leslie's deposition.

The decision striking the Mower Declaration should be reversed and this matter remanded to the trial court for trial.

**II. The Trial Court Erred When it Granted Summary Judgment to Simpson and Deemed All of Simpson Defendants' Facts Uncontroverted Based on a Hyper-Stringent Reading of Rule 7(c)(3), Utah Rules of Civil Procedure.**

The trial court disregarded Plaintiffs' pleadings and declarations opposing summary judgment, claiming there were technical pleading errors in Plaintiffs' memoranda. The trial court refused to consider all the facts in the Court Record and improperly found Defendants' facts unopposed. Based on the fiction of unopposed facts, the trial court proceeded to make findings and conclusions supporting summary judgment.

Former Rule 7(c)(3) of the Utah Rules of Civil Procedure requires the memorandum of a party opposing summary judgment contain four things: a verbatim restatement of each of the moving party's facts, a statement that the fact is controverted, an explanation of the grounds for any dispute, and any dispute is to be supported by citation to relevant materials, such as affidavits or discovery materials. The trial court found Plaintiffs failed to provide

supporting citations to relevant materials for facts they disputed in Defendants' memoranda in support of summary judgment. It therefore deemed all of Defendants' facts as admitted. See Ruling and Order, p. 8 (R.815).

In Plaintiffs' Opposition to Motion for Summary Judgment, Plaintiffs set out each of Simpson's facts *verbatim*, as required by Rule 7. Also, as required by Rule 7, following each fact the basis for any dispute was set out. Then, as allowed by the Rule, Plaintiffs included a "Statement of Additional Facts," which included all the statements of contested facts, with citations to the record for all sources available at that time, including specific citations to the Reeb Declaration.<sup>8</sup> The trial court decided none of the Defendant Simpson's facts were disputed because it required the citations to the record to be in the verbatim responses to the Simpson facts, not in the Statement of Additional Facts section of the same opposing memorandum. It also concluded the Reeb Declaration could be ignored by the same reasoning. The trial court determined everything in the record, all the Statement of Additional Facts, the Reeb Declaration, Mower Declaration, and all subsequent filings, including the Motion to Reconsider, could be ignored because citations to the record were set out in Plaintiff's Statement of Additional Facts, not accompanying Plaintiffs' denials and explanations for disputing the Simpson facts.

The Statement of Additional Facts directly supported the disputed facts and included specific references to the Reeb Declaration. Despite Plaintiffs' substantial compliance with Rule 7 (applicable at the time) of the Utah Rules of Civil Procedure, the trial court ignored

---

<sup>8</sup> The Mower Declaration was filed on April 17, 2014 (R.485) a week after the opposition memorandum was filed. (R.367).

the contested facts, found all of Simpson's facts *undisputed*, and reasoned that the record need only be acknowledged when cited at the spot in the opposing memorandum where grounds for any dispute are set out, and not elsewhere. This hyper-stringent approach permitted the trial court to also discard all Plaintiffs' declarations filed in opposition to summary judgment. That was error and should be reversed.

A "trial court has discretion in requiring compliance with Rule 7 of the Utah Rules of Civil Procedure." *Jennings Investment, LC*, 2009 UT App 119 at ¶ 24. A trial court "has discretion to either grant summary judgment for noncompliance with rule 7(c)(3)(B) or to regard the failure to comply with the rule as a mere technical violation and consider the motion on its merits." *Id.* at ¶ 25. Unlike this case, in *Jennings*, the nonmoving party failed to include a verbatim restatement of each of the facts offered by the moving party that the responding party contested. *Id.* at ¶ 23.

Despite the failure to provided a verbatim restatement, in the *Jennings* case the Court of Appeals nevertheless conducted a "careful review of [the] opposition memorandum and the attached ... affidavits" relating to summary judgment. *Id.* at ¶ 25. After concluding the review, the Court of Appeals found the affidavits revealed no disputed facts. *Id.* The Appeals Court therefore concluded the trial court did not abuse its discretion in deeming the moving party's facts were not properly contested. *Id.* at ¶ 28.

Contrary to *Jennings*, in this case, the Reeb Declaration and Mower Declaration clearly establish disputed material facts. The Reeb Declaration explains that Hobble Creek Investments LLC did not require the Mackeys' property as a condition for selling the

Thornhill Parcel. Hobble Creek Investments would have accepted *any* parcel that abutted theirs, including Plaintiff's property. Additionally, the Mower Declaration clearly explains Dolezsar acted outside of any authorization he may have received to act for her. It declares that Plaintiffs did not have any knowledge that property was given to Mackeys by Simpson, or of Simpson's questionable other dealings with property purchased with Plaintiffs' funds, until *after* the death of Dolezsar. These disputed facts alone are sufficient to defeat summary judgment.

The trial court was aware of these disputed facts. In addition to being filed in the record, they were referred to numerous times at oral argument. Unlike *Jennings*, Plaintiffs here included a verbatim restatement of the facts, the basis upon which they were contested. Plaintiffs included additional facts with citations to the court record, such as the Reeb Declaration. Further, after Plaintiffs submitted their opposing memorandum, they submitted the Mower Declaration also as part of their opposition.

As in *Jennings*, this court should review the Reeb and Mower Declarations and determine if there were any dispute of facts. *See Id.* at ¶ 25. This court should consider Plaintiffs' Statement of Additional Facts, which cites the Reeb Declaration, and then determine if Plaintiffs showed a dispute of material fact. If the record reveals a dispute, this Court should overturn the trial court's decision as an abuse of discretion.

In *Fennell v. Green*, 2003 UT App 291, 77 P.3d 339, this Court was asked to review a party's failure to comply with pleading rules regarding summary judgment.<sup>9</sup> However, in

---

<sup>9</sup> *Fennell* deals with the interpretation of Rule 4-501(2)(B) of the Utah Rules of Judicial Administration which governed pleading norms on summary judgment before the



*Fennell*, the plaintiff did not comply with the rule in *any* respect. The Plaintiff "did not refer to Defendants' statements of uncontroverted facts, but instead included only his own statement of undisputed facts." *Id.* at ¶ 7. The trial court concluded that because of the failure to comply with governing rule, "it was unclear what facts Fennell contended were disputed." *Id.*

We are not faced with the *Fennell* problem here. Plaintiffs included a verbatim restatement of Defendants' facts and a concise statement of the disputed facts. Plaintiffs submitted additional facts supported by materials in the court record to controvert those facts. The trial court has discretion to require compliance with the Rules of Civil Procedure, however, discretion is not this broad, and was abused.

Summary Judgment is only appropriate "when, viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Suarez v. Grand County*, 2012 UT 72, ¶ 18, 296 P.3d 688; *See also* Utah R. Civ. P. 56. "[S]ummary judgment is a drastic remedy and should be granted with reluctance." *Housely v. Anaconda Co.*, 427 P.2d 390, 393 (Utah 1967). "Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery." *Drysdale v. Ford Motor Co.*, 947 P.2d 678, 680 (Utah 1997). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories,

---

standards moved to Rule 7, URCP.

admissions, and affidavits show that there is no genuine issue as to any material fact ...." *Amjacs Interwest, Inc. v. Design Associates*, 635 P.2d 53, 54 (Utah 1981). If there is any "dispute as to any issue of fact which would be determinative of the rights of the parties, it should be denied and a trial should be had to resolve the disputed issues." *Transamerica Title Ins. Co. v. United Resources, Inc.*, 471 P.2d 165, 167 (Utah 1970). The trial court must also construe all facts and reasonable inferences in a light favorable to the non-moving party. *See USA Power, LLC v. PacifiCorp*, 2010 UT 31, ¶ 33, 235 P.3d 749.

The trial court should consider "all facts" and "all inferences from those facts" when reviewing a motion for summary judgment. *See Goodnow v. Sullivan*, 2002 UT 21, ¶ 17, 44P.3d 704. In addition, the trial court must consider "the pleadings, depositions, answers to interrogatories, and admissions **on file**, together with the affidavits ...." *Brower v. Brown*, 744 P.2d 1337, 1338 (Utah 1987) (emphasis added). Here, the trial court ignored the Reeb Declaration and the Mower Declaration. That was error. To ignore materials in the record and to ignore the facts within the very same memorandum is an abuse of discretion. *See Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) ("[T]he fundamental purpose of our liberalized pleading rules is to afford parties 'the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.'" (quoting *Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963))); *see also Timm v. Dewsnap*, 851 P.2d 1178, 1182-83 (Utah 1993); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 464 (Utah 1983).

### **III. It was Error to Find that the Statute of Limitations Had Run on Plaintiffs' Claims.**

Relying only on Defendants' facts, the trial court held that the statute of limitations had run on certain of Plaintiffs' claims. A decision concerning the running of the statute of limitations is an affirmative defense requiring Defendant to bear the burden of proof. *See Christiansen v. Union Pacific Railroad*, 2006 UT App 180, ¶ 12, 136 P.3d 1266. This issue is a question of fact to "be resolved by the trier of facts." *Brower*, 744 P.2d at 1339. In any case involving a dispute over discovery of the injury, "the determination of when the plaintiff should have discovered the legal injury is a question for the trier of fact." *Id.* (citing UCA§78-12-47 (1987), now renumbered to §78B-2-114(2015)).

The trial court reached its conclusion by finding Dolezsar was acting as Leslie's agent and therefore it imputed Dolezsar's knowledge to Leslie. However, Dolezsar was never authorized to give away Plaintiffs' property. He was authorized to acquire property for Leslie. Dolezsar never disclosed Simpson's transfer of property to the Mackeys. Leslie was not aware of the transfer until after Dolezsar's death, which was within three years of filing the Complaint. The statute of limitations issue involves disputed facts.

Plaintiffs' claims for fraud and negligent misrepresentation are based on representations from Simpson that he transferred to Plaintiffs *all* of the property he acquired in Hobble Creek Canyon with her funds. (Ruling and Order R.813). Plaintiffs argue the failure to transfer the Storrs and Olsen Parcels to Plaintiffs support their claims against Simpson. *Id.* The property transfer did not require the Mackeys to convey anything to the

Thornhills or to Hobble Creek Investments LLC. *Id.* This is established by the Reeb Declaration and explained in the Motion for Supplemental Briefing.

When the trial court granted summary judgment based on the statute of limitations, it determined the statute began to run from the date of closing the property transactions. (R.820). The trial court relied solely on Defendants' version of the facts: that Dolezsar was Leslie's agent; that Dolezsar was aware of the details of each of the transactions; and that his knowledge was imputed to Leslie. *Id.* This conclusion is fact intensive and disputed. Whether Dolezsar was Leslie's agent, whether he acted within the scope of that agency and whether his knowledge at the time of closing can be imputed to Leslie are all disputed in the Mower Declaration. Furthermore, the Power of Attorney Defendants relied on was not given until the year following the Hobble Creek property transactions. (*See* Power of Attorney dated January 10, 2007.) (R.624-630).

Plaintiffs opposed summary judgment, arguing that Dolezsar was not authorized to participate in a scheme to deprive Leslie of property she paid for by allowing Simpson to gift it to Mackeys. Generally, under agency law, a "principal is chargeable with, and bound by, the knowledge of ... his agent." *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 16, 61 P.3d 1009. However, "it is well established that, where the agent has interests in the transaction adverse to the principal's, or where the agent colludes with third parties whose interests are adverse to the principal's interests, knowledge of the facts at issue will not be imputed to the principal." *Jensen v. IHC Hospitals, Inc.*, 2003 UT 51 ¶ 63, 82 P.3d 1036. The Mower Declaration states, "I did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death

of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007." (R.486).

That statement of fact is uncontested.

Furthermore, Leslie's deposition testimony is consistent with the statements in her declaration:

Q. Do you have any reason to – did you have an understanding that Hobble Creek Investments would not sell the 98.24 acres unless they received this right of use easement from the Mackeys?

A. Heavens no. I didn't know any of the manipulation and the dealings that was going on. No one kept me informed whatsoever.

(Mower Deposition p. 85) (R.884).

Q. And were you aware that that was part of the consideration Hobble Creek Investments required in order to sell the 98.24 acres to you?

A. I was never discussed about any manipulation, any turning over property for property or in any of the dealings that went on with the ranch. I wish I had been but I wasn't.

Q. And Ken never told you any of that; right?

A. No, he did not.

*Id.* at 89-90 (R.887-888 - Questioning by C. Carlile).

Based on the Mower Declaration and her consistent deposition testimony, there is a genuine issue of material fact as to whether Dolezsar was Leslie's agent, and whether he was acting within the scope of that agency when he failed to tell her that Simpson gave to Mackeys the Storrs and Olsen parcels purchased with her funds. It is also clear that the receipt of an easement over 4.5 acres of Mackey's property was unnecessary for the purchase of the Thornhill Parcel. Hobble Creek Investment LLC would have accepted property from anywhere, but Simpson chose to involve Mackeys to settle their claims against him. That was self-dealing by a fiduciary who betrayed Leslie to benefit himself.

If Dolezsar was not Leslie's agent when he gave away property to Mackeys— or if he acted outside any authority granted him—then the statute of limitations did not begin to run on Plaintiffs' claims until after Dolezsar's death—when Plaintiffs became aware of the transactions. Therefore summary judgment should not have been granted.<sup>10</sup>

When a claim arises out of fraud, even if it concerns real property, "the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting the fraud." Utah Code Ann. § 78B-2-305(3). The aggrieved party must then commence litigation within three years of the date of discovery. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 21, 108 P.3d 741 (noting that the three-year statute of limitations for a fraud claim does not begin to run until "a plaintiff either discovered or should have discovered his or her cause of action). One of the frauds Simpson committed is his representation to Leslie that he had conveyed all property to Plaintiffs acquired in Hobble Creek Canyon using Plaintiffs' funds. Mower Declaration ¶ 10 (R.487). The undisputed fact remains that Leslie did not learn of the underlying transactions, including the Simpson-Storrs-Olsen-Mackey transaction, until after Dolezsar's death November 15, 2007.

A genuine issue of material fact exists as to whether the statute of limitations ran against Plaintiffs. "The purpose of summary judgment is to eliminate the time, trouble, and expense of trial when it is clear as a matter of law that the party ruled against is not entitled

---

<sup>10</sup> The trial court failed to consider the alternative argument against summary judgment that, because the Mackeys have admitted that they hold 12-14 acres of Plaintiffs' property as a result of the fraudulent property transaction, the statute of limitations has not begun to run even now. The trial court dismissed any claims on the transfer of the 12-14 acres back to Plaintiffs because those claims were not considered ripe. (R.974).

to prevail." *Amjacs Interwest, Inc.*, 635 P.2d at 54. The moving party "may satisfy its burden on summary judgment by showing, by reference to 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' that there is no genuine issue of material fact." *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600 (quoting URCP 56(c)). The movant can only meet its burden by showing the **facts** demonstrate there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

Conversely, as the "nonmoving party, [Leslie] 'is entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom in the light most favorable to [her].'" *Uintah Basin Med. Ctr. v. Hardy*, 2008 UT 15, ¶ 19, 179 P.3d 786 (quoting *Morris v. Farnsworth Motel*, 259 P.2d 297, 298 (Utah 1953)). Defendants twist the standard and argue for the trial court to view matters in favor of Defendants. That is contrary to the law.

#### **IV. The Trial Court Abused its Discretion When it Denied Plaintiffs' Motion for Reconsideration When the Case Was Not Fully Resolved and the Court Record Demonstrated Genuine Issues of Material Fact.**

On August 21, 2014, the trial court issued its Ruling on Simpson Defendants' Motion for Summary Judgment and Order. On September 4, 2014, Plaintiffs filed a Motion for Reconsideration. On April 7, 2015, Plaintiffs' motion was denied in a written order which did not set forth the trial court's reasoning but stated the motion was denied "according to the Court's oral ruling made at the hearing." (R.998).

Reconsideration was appropriate given the defects in the trial court's prior rulings on both summary judgment and the motion to strike the Mower Declaration. Those reasons were fully briefed for the court and any defective citations to the record were cured. "While

a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision." *IHC Health Services, Inc.*, 2008 UT 73 at ¶ 27.

In *Timm v. Dewsnap*, 851 P.2d 1178 (Utah 1993), the trial court denied Dewsnap's motion to reconsider summary judgment, stating "no such motion exists under the Rules of Civil Procedure." *Id.* at 1184. The Utah Supreme Court reversed, holding that "Rule 54(b) permits the reconsideration of a nonfinal judgment 'since it facilitates the just and speedy resolution of disputes in the trial court.'" *Id.* at 1185. The Court of Appeals has held that a trial court may reconsider its prior ruling when, among other things, a party offers new evidence, to avoid manifest injustice or to correct its own errors. *See State v. O'Neil*, 848 P.2d 694, n.2 (Utah App 1993), cert. denied 859 P.2d 585 (Utah 1993). The trial court erred in this case when it was given the opportunity to correct its errors on summary judgment, but refused to do so.

Plaintiffs showed contested issues of fact and cured any possible technical defect in the pleadings. The trial court should have recognized its error and avoided manifest injustice because summary judgment is a drastic remedy and should be granted with reluctance. *See Housely*, 427 P.2d at 393. Instead, it imposed an unreachable standard of "extraordinary circumstances" relying on Simpson's novel argument that the Supreme Court's statement in *Shipman v. Evans* allowed motions to reconsider only to be granted in the most rare of circumstances. *See Shipman v. Evans*, 2004 UT 44, n. 5, 100 P.3d 1151. Simpson claimed this case prevented the trial court from changing its prior ruling. That is NOT the standard.



**V. The Trial Court Erred in Granting the Mackey Defendants Summary Judgment Based Upon Law of the Case. .**

As the record reflects, before the Mackay summary judgment hearing, the record also included a Motion for Reconsideration, an opposition to the Mackey Motion for Summary Judgment, the Mower Declaration and the Reeb Declaration. Notwithstanding additions to the record before the Mackey hearing, the trial court granted Mackey's Motion for Summary Judgment based upon a "law of the case." This was error.

The "law of the case" is a legal doctrine under which a decision made on an issue during one stage of a case may be binding in successive stages of the same litigation. *Plumb v. State*, 809 P.2d 734, 739 (Utah 1990). The doctrine was developed in the interest of economy and efficiency and to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case. *See Richardson v. Grand Central Corp.*, 572 P.2d 395, 397 (Utah 1977); *O'Neil*, 848 P.2d at 697, *cert. denied*, 859 P.2d 585 (1993); *see also* 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4478 (1981) [hereinafter Wright]; 1B James W. Moore et al., *Moore's Federal Practice* P 0.404 [hereinafter Moore]. "However, this doctrine does not prevent a judge from reconsidering his or her previous nonfinal orders." *Plumb*, 809 P.2d at 740 (citing 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* para. 0.404[4.-1] (2d ed. 1988)). "As Justice Holmes once noted, the law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Id.* (citing *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912)).

Indeed, the doctrine need not be applied to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent. Accordingly, the doctrine will generally not be enforced "(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *Thurston v. Box Elder County*, 892 P.2d 1034, 1039 (Utah 1995); *see also* 18 Charles Allen Wright et al., *Federal Practice & Procedure* § 4478, at 790 (1981).

The case posture changed dramatically from when the Simpson Defendants' Motion for Summary Judgment was originally briefed to when Mackey's motion for summary judgment was argued. The trial court abdicated its responsibility to decide the matter on the merits when it relied on the law of the case theory and ignored the court record. The record at the time the trial court considered the Mackey motion for summary judgment contained all the required citations the lower court claimed were missing before. It was error for the trial court to ignore the record and grant summary judgment based on a misapplication of the law of the case doctrine.

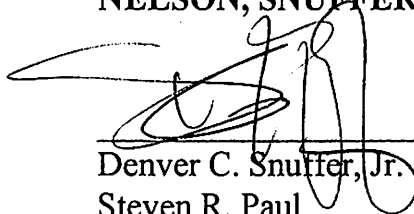
Further, Mackeys have always admitted they have in their possession 12-14 acres of property Plaintiffs paid for and that should be returned Plaintiffs. The exact amount and location of that property has never been determined, but more especially, never transferred and is still held by the Mackeys. This is a part of the Plaintiffs' claims and was entirely ignored by the trial court. Summary judgment cannot be appropriate under such circumstances. The law of the case doctrine is not so sweeping in scope and effect. This was error.

## CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court reverse the error of the trial court and remand for resolution of the party's claims on the merits.

DATED this 23<sup>rd</sup> day of December, 2015.

**NELSON, SNUFFER, DAHLE & POULSEN**

A handwritten signature in black ink, appearing to read "Denver C. Snuffer, Jr.", is written over a horizontal line.

Denver C. Snuffer, Jr.  
Steven R. Paul  
Daniel B. Garriott,  
**Nelson, Snuffer, Dahle & Poulsen, P.C**

William T. Jennings  
**Law Office of William T. Jennings**  
Attorneys for Appellant

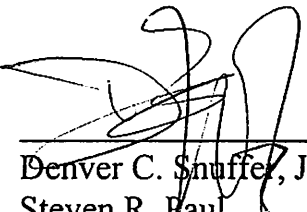
**CERTIFICATE OF COMPLIANCE**

As required by Utah Rules of Appellate Procedure Rule 24(f)(1)(C), I certify that **APPELLANT'S OPENING BRIEF ON APPEAL** contains 9,980 words, excluding the parts of the Opening Brief that are exempted by Utah Rules of Appellate Procedure Rule 24(f)(1)(B).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2015.

By: \_\_\_\_\_

  
Denver C. Snuffer, Jr.  
Steven R. Paul  
Daniel B. Garriott  
Attorneys for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **APPELLANT'S OPENING BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

Craig Carlile (0571)  
**RAY, QUINNEY & NEBEKER, PC**  
86 North University Ave., Suite 430  
Provo, UT 84601

Andy V. Wright (11071)  
Aaron R. Harris (4778)  
**DURHAM JONES & PINEGAR, P.C.**  
3301 North Thanksgiving Way, Ste. 400  
Lehi, UT 84043

on this 23<sup>rd</sup> day of December, 2015.

A handwritten signature in black ink, consisting of stylized, overlapping loops and lines, positioned above a horizontal line.

## **ADDENDUM TABLE OF CONTENTS**

1. Memorandum in Opposition to Simpson Defendants' Motion for Summary Judgment (R. 000367-000383)
2. Declaration of Paul Reeb (R. 000724-000727)
3. Declaration of Leslie Dee Mower in Support of Plaintiffs' Opposition to Simpson Defendants' Motion for Summary Judgment (R. 000602-000604)
4. Ruling on Simpson Defendants' Motion for Summary Judgment and Order (R. 000808-000822)
5. Motion and Memorandum Re: Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment (R. 000823-000933)
6. Ruling on Mackey Defendants' Motion for Summary Judgment and Order (R. 001126-001142)
7. Order Denying Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment (R. 000997-000999)

# ADDENDUM 1

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III, LLC, a Utah limited liability company; LD RANCH, LLC, a Utah limited liability company;

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual; LANDMARK REAL ESTATE, INC., a Utah corporation; WOOD SPRINGS, LLC, a Utah limited liability company; PHEASANT MEADOWS, LLC, a Utah limited liability company; KIRSTEN W. MACKEY, an individual; DEAN MACKEY; an individual; and DOES 1-10

Defendants.

---

**MEMORANDUM IN OPPOSITION TO  
SIMPSON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Civil No. 100403908

Judge Lynn W. Davis

---

Plaintiffs Leslie D. Mower, LD III, LLC, and LD RANCH, LLC, by and through their counsel of record, respond to Simpson Defendants' Motion for Summary Judgment as follows.



Based on the arguments herein and the additional facts contained in the Declaration of Paul Reeb, the motion for summary judgment should be denied.

### **INTRODUCTION**

Pursuant to Rule 56(c), summary judgment should only be granted in a case where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Simpson Defendants have not met the burden required under Rule 56(c) to prevail on the issues raised in their motion.

The motion seeks dismissal of Plaintiff’s claims based on the factual assertion that “the key parcel could not have been acquired without trading some other property. In short, some property was the consideration to acquire the key parcel.” (Motion page 2). Simpson Defendants claim this factual assertion vitiates all of Plaintiffs’ claims. This is simply not the case. The facts at trial will demonstrate that there was no need for any “traded property” and certainly that the Mackey parcel was not a “key parcel” to any subsequent transactions.

Simpson Defendants also claim Plaintiffs’ requested relief is barred by the statute of limitations, hoping the claim persuades the Court to dismiss Plaintiffs’ claims. There is no basis for dismissal under the statute of limitations. As such, the summary judgment motion should be denied.

### **RESPONSE TO STATEMENT OF UNDISPUTED FACTS**

Plaintiffs respond to each of the numbered paragraphs in Simpson Defendants’ motion as set forth hereafter:

Paragraph 1: In 2005, Mower “wanted to purchase enough property in Hobble Creek Canyon for a horse ranch and equestrian center.”

RESPONSE: Admitted.

Paragraph 2: Mower's since deceased husband, Kenneth Dolezsar ("Dolezsar"), worked with Simpson to assemble and acquire enough property for a horse ranch and equestrian center and instructed that the properties be acquired in the name of nominees.

RESPONSE: Plaintiffs deny that Dolezsar instructed or authorized Simpson to acquire property in Hobbie Creek Canyon in his own name or in the name of any entity which he owned or controlled. Plaintiffs affirmatively state that Leslie Mower ("Mower") did not authorize any such transaction or instruct Simpson take title to property in Hobbie Creek Canyon on her behalf individually or through nominees.

Paragraph 3: Simpson was not acting as a real estate agent for either Dolezsar or Mower or any of Mower's entities.

RESPONSE: Plaintiffs deny the legal conclusion asserted by Simpson. Simpson was, at all relevant times, a licensed real estate agent in the State of Utah and declared himself to be a real estate agent to all individuals or entities for which he was acquiring property in Hobbie Creek Canyon.

Paragraph 4: Simpson never had any conversations with Mower regarding the purchase and acquisition of any of the properties assembled by Simpson and Dolezsar for a horse ranch and equestrian center.

RESPONSE: Admitted. Simpson intentionally avoided contact with Mower because he knew that she would not approve of his representing her or her interests in any way. Dolezsar and Simpson acted covertly to avoid confrontation with Mower or that she might discover Simpson's

involvement. Had she found out that Simpson was involved, she would have terminated his involvement, which would have affected him financially – so he and Dolezsar intentionally deceived Mower and kept her uninformed.

Paragraph 5: On or about March 3, 2006, David Simpson (“Simpson”), as the managing member of Wood Springs, LLC, as nominee, purchased approximately 268 acres of land in Hobble Creek Canyon (the “Crandall Parcel”) in connection with assembling property for a horse ranch and equestrian center.

RESPONSE: Plaintiffs admit only that on or about March 3, 2006, Wood Springs, LLC, took title to the Crandall Parcel. Plaintiffs deny that Simpson was authorized to take title to any real property as an authorized nominee of Plaintiffs or that the transaction was authorized or sanctioned by Plaintiffs in any way.

Paragraph 6: The purchase price of the Crandall Parcel was \$2,000,000 and was paid as follows: (a) \$200,000 to Carolyn Crandall; (b) \$200,000 to Joan Orton; (c) \$200,000 to Cathleen C. Lloyd; and (d) \$1,400,000 to Exchange Pro, Inc. As accommodator for Crandall Hobble Creek Ranch, L.L.C., LaMar V. Crandall, operating manager.

RESPONSE: Plaintiffs admit only that the purchase price for the Crandall Parcel was \$2,000,000.

Paragraph 7: On or about February 15, 2006, Wood Springs, LLC, as nominee, purchased additional property in Hobble Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the “Storrs Parcel”).

RESPONSE: Plaintiffs admit only that on or about February 15, 2006, Wood Springs, LLC, took title to the Storrs Parcel. Plaintiffs deny that Simpson was authorized to take title to any real

property as an authorized nominee of Plaintiffs or that the transaction was authorized or sanctioned by Plaintiffs in any way.

Paragraph 8: On or about July 3, 2006, Simpson, as manager of Pheasant Meadows, LLC, as nominee, acquired additional property in Hobble Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Olsen Parcel").

RESPONSE: Plaintiffs only admit that on or about July 3, 2006, Pheasant Meadows, LLC, took title to the Olsen Parcel. Plaintiffs deny that Simpson was authorized to take title to any real property as an authorized nominee of Plaintiffs or that the transaction was authorized or sanctioned by Plaintiffs in any way.

Paragraph 9: On or about March 23, 2006, Wood Springs, LLC, as nominee, entered into a Real Estate Purchase Contract for additional land in Hobble Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Thornhill Parcel"). The owner of the Thornhill Parcel, Hobble Creek Investments, agreed to sell the Thornhill Parcel in exchange for the following: (a) \$1,750,000, (b) approximately 6.5 acres of the Crandall Parcel, and (c) approximately 4.5 acres of property owned by Kristin Mackey.

RESPONSE: Plaintiffs admit only that the purchase of the Thornhill property included payment of \$1,750,000 and transfer of approximately 10 acres to Hobble Creek Investments, LLC. Plaintiffs deny that Simpson was authorized to take title to any real property as an authorized nominee of Plaintiffs or that the transaction was authorized or sanctioned by Plaintiffs in any way. Plaintiffs

further affirmatively allege that Hobble Creek Investments, LLC did not demand any real property owned by Mackey as part of the real estate transaction. See Affidavit of Paul Reeb filed herewith.

Paragraph 10: Previous to and independent of the effort to assemble property for a Mower horse ranch and equestrian center, on or about August 4, 2005, Kristin Mackey purchased approximately 49 acres of land in Hobble Creek Canyon (the "Mackey Parcel"). Approximately 33 acres were located on the west side of the road and approximately 16 acres was located on the east side of the road.

RESPONSE: Denied. For purposes of this motion, Plaintiffs deny that Mackeys purchased the Mackey Parcel. Mackeys have not proved to the satisfaction of Plaintiffs that they properly acquired the Mackey Parcel.

Paragraph 11: Kristin Mackey agreed to transfer 7.0 acres of her property interest to the owners of the Thornhill Parcel in exchange for the Storrs and Olsen Parcels. Mackey agreed to transfer to Mower or her interests 12 to 14 acres of the Mackey Parcel that were not necessary for obtaining a building permit for the Mackey Parcel from Utah County.

RESPONSE: Denied. In this motion Simpson relies on the transfer of the 7 acres of the Mackey Parcel as essential to the acquisition of the Thornhill Parcel. Plaintiffs deny that assertion and affirmatively state that Hobble Creek Investments, LLC would have transferred the Thornhill Parcel to Plaintiffs with the reservation of any 10 acre parcel.

Paragraph 12: To acquire the Thornhill Parcel required a three way trade involving the Crandall Parcel, the Mackey Parcel and the Storrs/Olsen Parcels. The Storrs/Olsen Parcels were to be deeded to Mackey; Mackey would then transfer to the owners of the Thornhill Parcel an interest in the Mackey Parcel. Also, a portion of the Crandall Parcel would be deeded to the owner of the Thornhill Parcel.

RESPONSE: Denied. See above.

Paragraph 13: The three-way trade occurred as follows: (a) The Storrs Parcel was transferred to Mackey on August 24, 2006; (b) The Olsen Parcel was transferred to Mackey on August 24, 2006; (c) Mackey transferred to the owner of the Thornhill Parcel a Right of Use Easement on August 27, 2006; (d) The 6.5 acres of the Crandall Parcel was transferred to the owner of the Thornhill Parcel on April 27, 2006; and (e) On August 8, 2006, Simpson, on behalf of Wood Springs, LLC, as nominee, and Mackey executed an agreement (the "Reconveyance Agreement") whereby they agreed to transfer to Wood Springs the 12 to 14 acres of the Mackey Parcel that would not be necessary for Mackey to obtain a building permit on the remaining Mackey Parcel combined with the Storrs/Olsen Parcel.

RESPONSE: Plaintiffs admit that the real property transactions occurred in essentially the manner described. However, Plaintiffs deny that such transactions were necessary to effect the purposes of acquiring property for the horse ranch and equestrian center. Simpson approached Hobble Creek Investments, LLC to purchase the Thornhill Parcel. Hobble Creek Investments, LLC agreed to sell the Thornhill Parcel, reserving 10 acres for itself. Hobble Creek Investments, LLC did not demand any portion of the Mackey Parcel and would have agreed to any 10 acres that adjoined its existing

holdings in the canyon. Further, Plaintiffs deny Simpson was authorized to act as a nominee for Plaintiffs and also denies they ever agreed to the Reconveyance Agreement.

Paragraph 14: The title to the Thornhill Parcel was transferred to Wood Springs, LLC, as nominee, on April 27, 2006.

RESPONSE: Plaintiffs admit only that on or about April 27, 2006, Wood Springs, LLC, took title to the Thornhill Parcel. Plaintiffs deny that Simpson was authorized to take title to any real property as an authorized nominee of Plaintiffs or that the transaction was authorized or sanctioned by Plaintiffs in any way.

Paragraph 15: Mower constructed an equestrian center on the Thornhill Parcel.

RESPONSE: Plaintiffs admit only that LD Ranch, LLC built an equestrian center on what was previously the Thornhill Parcel.

Paragraph 16: On or about July 17, 2007, Wood Springs transferred to LD Ranch, LLC all of the Thornhill Parcel and all of the Crandall Parcel less the 6.5 acres traded to acquire the Thornhill Parcel.

RESPONSE: Plaintiffs admit only that Wood Springs, LLC conveyed real property to LD Ranch, LLC that was previously owned by Crandall and Thornhill.

Paragraph 17: LD Ranch, LLC is a limited liability company of which Leslie Dee Mower is the sole member.

RESPONSE: Admitted.

Paragraph 18: Simpson did all that was necessary to effectuate the transfer of the 12-14 acres of the Mackey Parcel from Mackey to Wood Spring, LLC as provided in the

Reconveyance Agreement, including obtaining a survey description of the property to be conveyed, a zone clearance from Utah County and deeds to LD Ranch, LLC.

RESPONSE: Plaintiffs admit only that Simpson and Mackey obtained a survey and prepared quit claim deeds to transfer 12-14 acres to Plaintiffs in absolution of their wrongdoing in this manner. However, the act of returning 12-14 acres of stolen property while Mackeys keep nearly 65 acres they have not fully or properly paid for is considered by Plaintiffs to be woefully insufficient.

Paragraph 19: Mower has never accepted the deeds to the 12-14 acres from the Mackey Parcel.

RESPONSE: Admitted. See above.

#### **STATEMENT OF ADDITIONAL RELEVANT FACTS**

Plaintiffs offer the following additional relevant facts by declaration attached hereto to demonstrate that there exist genuine issues of material facts such that Simpson Defendants are not entitled to judgment of dismissal as a matter of law.

1. Plaintiffs Complaint asserts causes of action against Simpson Defendants for Fraud and Intentional Misrepresentation; Negligent Misrepresentation; Breach of Fiduciary Duties; Conversion; Unjust Enrichment; and Conspiracy. See Complaint dated November 12, 2010 on file with the court, at pages 26-28.

2. While the underlying property transactions that lead to the claims against the Simpson Defendants and the Mackeys occurred in 2006, the conveyances from Wood Springs and Pheasant Meadows (Simpson's entities) to Plaintiffs did not occur until July 17, 2007 or later – less than four years before the lawsuit was filed against Simpson Defendants. See Simpson Defendants' Memorandum, paragraph 16 above.



3. Plaintiffs did not discover the underlying transactions and frauds until after the death of Kenneth Dolezsar, which occurred November 15, 2007.

4. Simpson, through Wood Springs, conveyed the Storrs Parcel to Mackeys on August 24, 2006. See Simpson Defendants' Memorandum, paragraph 13 above.

5. Simpson, through Pheasant Meadows, conveyed the Nelson Parcel to Mackeys on August 24, 2006. Id.

6. Simpson represented to Plaintiffs and their agents on or after July 17, 2007, that he had transferred all the property to LD Ranch that he acquired in Hobble Creek Canyon with Mower's or LD III's funds.

7. The representation is untrue because Simpson did not convey to Plaintiffs the Storrs Parcel or the Nelson Parcel.

8. Prior to Simpson offering to purchase the Thornhill Parcel, Hobble Creek Investments, LLC, acquired a right of first refusal to purchase the Thornhill Parcel from Thornhills. Declaration of Paul Reeb at ¶6.

9. Hobble Creek Investments had contracted with Thornhills to purchase the Thornhill parcel for \$1,500,000. Id. at ¶7.

10. Simpson approached Hobble Creek Investments to purchase the Thornhill Parcel, including the release of the right of first refusal. Id. at ¶8.

11. Hobble Creek Investments told Simpson it would exercise its right of first refusal and purchase the Thornhill Parcel, then it would immediately convey the Thornhill Parcel to Simpson (or his assigns). To do that, Hobble Creek Investments required payment of \$1,750,000 and

approximately 10 acres of property that adjoined its current holdings in the canyon to convey the property to Simpson. Id. at ¶9.

12. Hobble Creek Investments did not express a preference for any particular parcel. Id. at ¶10.

13. It merely expressed its need for approximately 10 acres contiguous to its other property in the canyon. Id. at ¶11.

14. Hobble Creek Investments informed Simpson that it required the property to be a buffer to prevent construction of other homes or structures near the current property lines of property it already owned in the canyon. Id. at ¶12.

15. Simpson proposed that Hobble Creeks Investments receive a 6.5 acre parcel included in the Crandall Parcel and 4.5 acres from the Mackey Parcel as consideration for selling the Thornhill Parcel. Id. at ¶13.

16. Hobble Creek Investments did not demand the 4.5 acres from the Mackey Parcel and would have taken any 10 total acres. Id. at 14.

### ARGUMENT

In the event the Court denies the pending motion to strike Simpson Defendants' motion for summary judgment as untimely, Simpson Defendants' motion should be denied based on its substance because there exist genuine issues of material fact such that judgment cannot be granted to Simpson Defendants as a matter of law.

**I. Genuine Issues of Material Fact Preclude a Finding that Plaintiffs' Claims for Fraud and Negligent Misrepresentation Should be Dismissed.**

Simpson Defendants' first argument in the Motion for Summary Judgment must fail as the claims for fraud and negligent misrepresentation are based on Simpson's representation to Mower

and LD Ranch that he transferred all the property to LD Ranch that he acquired in Hobbie Creek Canyon with Mower's and LD III's funds. The representation is untrue because Simpson did not convey to Plaintiffs the Storr's Parcel or the Nelson Parcel.

Defendants' argue the transfer of the Storr's Parcel and the Nelson Parcel to Mackeys was a necessary part of the transaction to purchase the Thornhill Parcel and to satisfy the right of first refusal to Hobbie Creek Investments, LLC. As explained in the Declaration of Paul Reeb filed herewith, there was never a requirement that the Mackeys convey property to the Thornhills or to Hobbie Creek Investments. See Declaration of Paul Reeb.

Plaintiffs were not aware of the fraud and deceptions carried out by Simpson and Dolezsar until after Dolezsar's death on November 15, 2007. As such, the allegations of the Complaint, together with the affidavits, depositions and evidence before this Court demonstrate that there exist genuine issues of material fact regarding Plaintiffs' claims such that a decision cannot be made on the issues as a matter of law. Defendants' motion should be denied.

**II. Simpson Admits he Acted in a Representative Capacity for Plaintiffs in the Acquisition of Property in Hobbie Creek Canyon. As such, by his own Admission, the Second Argument for Summary Judgment Should be Denied.**

Simpson argues he was not acting as a real estate agent for any of the Plaintiffs. However, the allegation begs the question - in what capacity was Simpson acting? By his own admission, Simpson took title to property AS NOMINEE for Mower and LD Ranch. Every action Simpson took in identifying, acquiring, reconfiguring, transferring and conveying property in Hobbie Creek Canyon from 2005 thereafter with Mower's or LD Ranch's money was done in a representative capacity. As such, fiduciary duties attached to everything Simpson did with the money that did not belong to him. *Stevensen 3<sup>rd</sup> East v. Watts*, 2009 UT App 137 at ¶29 ("shall discharge his duties .

. . with the care an ordinarily prudent person in a like position would exercise under similar circumstances.").

Simpson argues that he did not violate any of fiduciary duties (assuming *arguendo* there are duties) owed to Plaintiffs because he did not retain any of the property he acquired in Hobble Creek Canyon for himself. Simpson is wrong. He breached his fiduciary duties to Plaintiffs by misappropriating monies that were entrusted to him to purchase property in Hobble Creek Canyon and by conveying the Storrs and Nelson parcels to the Mackeys without any consideration, property he claims he purchased for Plaintiffs and conveyed to Plaintiffs on or after July 17, 2007.

There exists a genuine issue of material fact that needs to be resolved by the trier of fact in this case as to whether the "necessary trade" to Mackeys as claimed by Simpson Defendants was indeed necessary. According to the Declaration of Paul Reeb, there was never a requirement that the Mackeys give up their property to satisfy the right of first refusal to Hobble Creek Investments. See Paul Reeb Declaration. Hobble Creek Investment would have accepted any 10 acre parcel that was contiguous to property it already owned in the canyon. *Id.*

Because there is a genuine issue of material fact relating to the necessity of trading land with the Mackeys, Defendants' motion should be denied.

### **III. Summary Judgment Should be Denied as to the Fifth Cause of Action in the Complaint for Conversion.**

Simpson Defendants argue that, because they didn't use the property for their own benefit over the nearly two years the property was titled in the name of a Simpson controlled entity, they are free of liability. Paragraph 114 of the Complaint, as quoted by Simpson in his brief, provides that "Simpson used Leslie's and LD III's funds for his own purposes . . . and when he transferred part of the real property to other parties." The allegations in the complaint are two-fold: Simpson

used the funds entrusted to him for his own purposes and Simpson failed to convey the property to Plaintiffs for nearly two years after purchasing those properties.

In addition to the foregoing, Simpson should be held accountable to the trier of fact for conveying property to Mackeys. Simpson converted the property from Plaintiffs when he failed to convey the Storrs Parcel and the Nelson Parcel to Mower or LD Ranch. Since Simpson had no legal authority to transfer the converted property to Mackey, the transaction should be unwound and the Storrs and Nelson Parcels returned to Plaintiffs.

Genuine issues of material fact dominate the questions of conversion of cash funds and real property by Simpson from the first money that exchanged hands to the present time – when Simpson has yet to convey to Plaintiffs all the property he acquired on Plaintiffs' behalf in the canyon. As such, summary judgment should be denied.

#### **IV. Plaintiffs' Claims are not Barred by the Statute of Limitations.**

Simpson Defendants also seek the dismissal of Plaintiffs' claims claiming the statute of limitations ran against such claims before the Complaint was filed. Simpson Defendants are wrong. Plaintiffs claims are not barred because the claims relate back to the dates of transfer of the property from the Simpson Defendants and affiliated entities to Plaintiffs, which occurred only on or after July 17, 2007.

More fundamentally, Plaintiffs did not discover the causes of action for fraud and negligent misrepresentation until after the death of Ken Dolezsar, which was November 15, 2007. As such, all claims in the Complaint were brought within the applicable statutes of limitation. See, *Bowen v. Bowen*, 2011 UT App 352 at ¶5. Specifically, the discovery rule operates to toll a statute of limitations "until the discovery of facts forming the basis for the cause of action." *Myers v.*

*McDonald*, 635 P.2d 84, 86 (Utah 1981). "We apply the discovery rule only when required by statute, when a defendant has affirmatively concealed a plaintiffs cause of action, or when exceptional circumstances exist." *Snow v. Rudd*, 2000 UT 20, ¶ 10.

Lastly, Simpson Defendants argue that Plaintiffs have not been damaged because Mackeys have offered to give them 12-14 acres they no longer need. This thinking demonstrates there is a genuine issue of material fact regarding the claims of Plaintiffs' Complaint. Plaintiffs were damaged by Simpson Defendants' actions when Plaintiffs paid \$190,000 for the Storrs Parcel and it was given by Simpson to the Mackeys. Plaintiffs were damaged when they paid \$105,000 for the Nelson Parcel and Simpson Defendants gave that property to the Mackeys. The attempt to return 12-14 acres of the stolen property while Mackeys keep nearly 65 acres of real property they have not fully or properly paid for is considered by Plaintiffs to be woefully insufficient.

In addition, Plaintiffs have been damaged by Simpson taking money from Plaintiffs for the purchase of property in Hobbie Creek Canyon and not accounting for the money taken nor conveying any such property to Plaintiffs for nearly two years from the time money was received until the property was conveyed.

Plaintiffs are entitled to have their claims decided by the trier of fact. As such, based on the genuine issues of material fact as pointed out herein and as supported by the declarations submitted herewith, the motion should be denied.

**CONCLUSION**

Based on the foregoing, Simpson Defendants' motion for summary judgment should be denied in its entirety.

DATED this 10<sup>th</sup> day of April, 2014.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

/s/ Steven R. Paul

Denver C. Snuffer, Jr.

Steven R. Paul

Daniel B. Garriott

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC  
and LD Ranch, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO SIMPSON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** via email through JudicialLink to the following:

Craig Carlile  
Ray, Quinney & Nebeker, PC  
86 North University Ave., #430  
Provo, UT 84601-4420  
*Attorneys for Defendants David R. Simpson,  
Landmark Real Estate, inc., Wood Springs,  
LLC, and Pheasant Meadows, LLC*

Sent via:  
☐ Mail  
☐ Facsimile  
☐ Hand-delivery  
☒ Electronic Service via Utah Court's e-filing program

Stephen Quesenberry  
Aaron R. Harris  
Durham, Jones & Pinegar, P.C.  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, UT 84604-5663  
*Attorneys for Defendants Dean Mackey and  
Kirsten W. Mackey*

Sent via:  
☐ Mail  
☐ Facsimile  
☐ Hand-delivery  
☒ Electronic Service via Utah Court's e-filing program

DATED this 10<sup>th</sup> day of April, 2014.

/s/ Steven R. Paul



## ADDENDUM 2

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company:

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KIRSTEN W. MACKEY, an  
individual; DEAN MACKEY; an individual;  
and DOES 1-10

Defendants.

**DECLARATION OF PAUL REEB**

Civil No. 100403908

Judge Lynn W. Davis

---

Paul Reeb, hereby declares and testifies as follows:



1. I am a resident of the State of Utah over the age of 18 and make this declaration in support of Plaintiffs' Leslie D. Mower, LD III, LLC, and LD RANCH, LLC, opposition to Simpson Defendants' Motion for Summary Judgment.

2. I make this declaration based on my own personal knowledge and if called upon to testify will do so consistent with the statements made herein.

3. I am a member of Hobbie Creek Investments, LLC, an Arizona limited liability company.

4. Hobbie Creek Investments, LLC owns property in Hobbie Creek Canyon, and has owned property in the canyon pre-dating the events of this dispute, which I understand began in approximately March ~~2005~~ *2006 PR*

5. In March of 2006, Hobbie Creek Investments was approached by David Simpson ("Simpson") to sell property in which it held a right of first refusal based on a contract it had with the Thornhills to purchase the parcel is known as the "Thornhill Parcel."

6. Prior to Simpson offering to purchase the Thornhill Parcel, Hobbie Creek Investments, LLC had acquired a right of first refusal to purchase the Thornhill Parcel from Thornhills.

7. Hobbie Creek Investments had contracted with Thornhills to purchase the Thornhill Parcel for \$1,500,000.

8. Simpson approached me, on behalf of Hobbie Creek Investments, to purchase the Thornhill Parcel, including the release of Hobbie Creek Investments' right of first refusal.

9. I told Simpson Hobbie Creek Investments would exercise its right of first refusal and purchase the Thornhill Parcel, then it would immediately convey the Thornhill Parcel to Simpson



(or his assigns). To do that, Hobble Creek Investments required payment of \$1,750,000 and approximately 10 acres of property that adjoined its current holdings in the canyon to convey the property to Simpson.

10. Hobble Creek Investments did not express a preference for any particular parcel to make up the 10 acres.

11. It merely expressed its need for approximately 10 acres contiguous to its other property in the canyon.

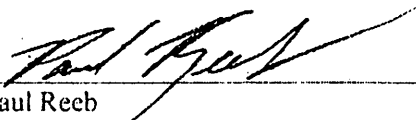
12. I informed Simpson that Hobble Creek Investments required the property to be a buffer to prevent construction of homes or other structures near the property it already owned in the canyon.

13. Simpson proposed that Hobble Creek Investments receive a 6.5 acre parcel included in the Crandall Parcel and 4.5 acres from the Mackey Parcel as consideration for selling the Thornhill Parcel.

14. Hobble Creek Investments did not demand the 4.5 acres from the Mackey Parcel and would have taken any property contiguous to its own to make up the 10 total acres.

15. I declare under the penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed this 10 day of April, 2014.

  
Paul Reeb

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing **DECLARATION OF PAUL REEB** via email through JudicialLink to the following:

Craig Carlile  
Ray, Quinney & Nebeker, PC  
86 North University Ave., #430  
Provo, UT 84601-4420

*Attorneys for Defendants David R. Simpson,  
Landmark Real Estate, inc., Wood Springs, LLC,  
and Pheasant Meadows, LLC*

Sent via:

☐ Mail

☐ Facsimile

☐ Hand-delivery

☒ Electronic Service via Utah Court's e-filing program

Stephen Quesenberry  
Aaron R. Harris  
Durham, Jones & Pinegar, P.C.  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, UT 84604-5663

*Attorneys for Defendants Dean Mackey and  
Kirsten W. Mackey*

Sent via:

☐ Mail

☐ Facsimile

☐ Hand-delivery

☒ Electronic Service via Utah Court's e-filing program

DATED this 10<sup>th</sup> day of April, 2014.

/s/ Steven R. Paul

## ADDENDUM 3

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel-B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company;

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KIRSTEN W. MACKEY, an  
individual; DEAN MACKEY; an individual;  
and DOES 1-10

Defendants.

---

**DECLARATION OF LESLIE DEE  
MOWER IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
SIMPSON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Civil No. 100403908

Judge Lynn W. Davis

---

Leslie Dee Mower, hereby declares and testifies as follows:

1. I am a resident of the State of Utah over the age of 18 and make this declaration in support of Plaintiffs' Opposition to Simpson Defendants' Motion for Summary Judgment.

2. I make this declaration based on my own personal knowledge and if called upon to testify will do so consistent with the statements made herein.

3. I am a named party to this lawsuit.

4. I deny the claim that my former husband, Kenneth Dolezsar instructed or authorized David Simpson to acquire property in Hobble Creek Canyon in his own name or in the name of any entity which he owned or controlled. I specifically did not authorize or instruct David Simpson to use my funds to acquire real property in Hobble Creek Canyon and to title the real property in his name or in the name of an entity which he owned or controlled.

5. I never authorized or instructed Ken Dolezsar to have David Simpson title property in David Simpson's name or in the name of an entity he owned or controlled.

6. For purposes of this motion, I deny that Mackeys purchased the Mackey Parcel. Mackeys have not proved to my satisfaction they properly acquired any of the Mackey Parcel.

7. During the time of the property acquisitions in 2005 and 2006, I believe Simpson avoided contact or communication with me because he knew based on previous problems I had in dealing with Simpson that I would not approve of his representing me or my interests in any way.

8. I did not know, or have reason to know, that David Simpson was involved in the purchase of land on my behalf in Hobble Creek Canyon. Had I found out that Simpson was involved, I would have terminated his involvement, which would have affected him financially. I believe Simpson and Dolezsar intentionally deceived me and kept me uninformed.

9. I did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007.

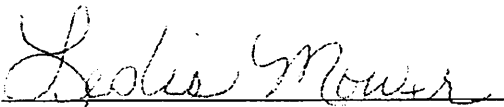


10. Simpson represented to me and my lawyers, on or after July 17, 2007, that he had transferred all the property to LD Ranch that he acquired in Hobbie Creek Canyon with my personal funds or LD III's funds.

11. The representation is untrue because Simpson did not convey to me or to any of the Plaintiffs the Storr's Parcel or the Nelson Parcel.

12. I declare under the penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed this \_\_\_\_ day of April, 2014.

  
Leslie Dee Mower

## ADDENDUM 4

**FILED**

AUG 21 2014

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH****LESLIE D. MOWER**, an individual; **LD III, LLC**, a Utah limited liability company; **LD RANCH, LLC**, a Utah limited liability company;

Plaintiffs

vs.

**DAVID R. SIMPSON**, an individual; **LANDMARK REAL ESTATE, INC.**, a Utah corporation; **WOOD SPRINGS, LLC**, a Utah limited liability company; **PHEASANT MEADOWS, LLC**, a Utah limited liability company; **KIRSTEN W. MACKEY**, an individual; **DEAN MACKEY**, an individual; and **DOES 1-10**.

Defendants

**RULING ON SIMPSON  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT  
AND ORDER**

CASE NO:100403908

DATE: August 14, 2014

JUDGE: LYNN W DAVIS

On March 11, 2014, Simpson Defendants, (David r. Simpson; Landmark Real Estate, Inc.; Wood Springs, LLC; Pheasant Meadows, LLC) filed a Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment. The Plaintiffs filed a Memorandum in Opposition to Simpson Defendants' Motion for Summary Judgment on April 10, 2014, and on May 1, 2014, the Defendants filed a reply. The Court received oral arguments from counsel and took the matter under advisement. The Court, having carefully considered the legal arguments of counsel, hereby rules as follows:

**I.****Procedural History**

- 1) On November 11, 2010, Plaintiffs filed a complaint against Defendants seeking damages for claims of fraud and intentional misrepresentation, negligent misrepresentation, breach

of fiduciary duties, aiding and abetting breach of fiduciary duties, conversion, unjust enrichment, conspiracy, and breach of contract, constructive trust and equitable lien.

- 2) On January 7, 2011, Defendants filed their answer.
- 3) On January 11, 2011, the parties filed a Stipulated Case Management Order.
- 4) On January 16, 2011, the parties filed a Stipulated Second Amended Case Management Order.
- 5) On April 19, 2013, a Stipulated Third Amended Case Management Order was filed.
- 6) On September 9, 2013, a Stipulated Fourth Amended Case Management order was filed.
- 7) On March 11, 2014, the Simpson Defendants filed a Motion for Summary Judgment.
- 8) On March 20, 2014, the Plaintiffs filed a Motion to Strike Simpson Defendants' Motion for Summary Judgment as Untimely based on the Fourth Amended Case Management Order.
- 9) On April 10, 2014, Plaintiffs filed a Memorandum in Opposition to Simpson Defendants Motion for Summary Judgment.
- 10) On April 14, 2014, Defendants filed a Memorandum in Opposition to Plaintiffs' Motion to Strike Simpson Defendants Motion for Summary Judgment.
- 11) On April 23, 2014, Plaintiffs filed a Reply Memorandum in Support of Plaintiffs' Motion to Strike.
- 12) On May 1, 2014, the Simpson Defendants filed a Reply Memorandum in Support of Motion for Summary Judgment.
- 13) On May 14, 2014, the parties met before Judge Davis for a pretrial conference.
- 14) On August 15, 2014, the Court denied Plaintiffs' Motion to Strike Simpson Defendants' Motion for Summary Judgment as Untimely.

**II.**  
**Standard of Review for a Motion for Summary Judgment**

The Simpson Defendants move the Court to decide the matter on summary judgment. The Court notes that summary judgment should be granted in a case where “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that moving party is entitled to a judgment as a matter of law.” Utah. R. Civ. Pro. 56(c).

**III.**  
**The Parties’ Arguments**

a. Defendants’ Arguments Supporting his Motion for Summary Judgment

In relation to the claims of fraud and negligent misrepresentation, Defendants argue that Plaintiffs’ claims should be dismissed because there were no representations made to any of the plaintiffs and the claimed misrepresentations were statements of true facts. Mower gave to her since deceased husband, Ken Dolezsar, a general power of attorney. *See*, February 13, 2013 deposition of Leslie DeeAnn Mower, pp. 102-105. Specifically, she stated that Mr. Dolezsar “was managing whatever affected me. So whatever affected me, Ken had power of attorney to take care of in my stead.” Mower Dep. 105:11-13. Mower’s only source of information regarding the transactions that are the subject of this lawsuit was Mr. Dolezsar, and Mr. Dolezsar was aware of the details of every transaction. Therefore, Defendants argue, there is no evidence that there were any representations made by the Simpson Defendants to any of the Plaintiffs regarding the acquisition or transfer of the properties at issue in this case.

Defendants further argue in regards to the claims of fraud and negligent misrepresentation that Mower testified that she did not have any conversations with Simpson regarding any of the transactions that are the subject of this action. The only person involved in

the acquisition of the properties on the Plaintiffs' side was Dolezsar who died while Mower was in prison in California. *See*, Mower Depo. pp. 34 and 53. Defendants argue that any claimed statement by Dolezsar is barred by Rules 601 and 802 of the Utah Rules of Evidence so there is no evidence that there were any representations made by Defendants to any of the Plaintiffs regarding the acquisition or transfer of the properties at issue in this case.

Defendants argue that none of the Simpson Defendants were engaged as real estate agents for any of the Plaintiffs, and therefore, they did not owe any of the Plaintiffs any duties as a real estate agent. The Plaintiffs do not identify how any of the Simpson Defendants other than Simpson owed a fiduciary duty to any of the Plaintiffs. Wood Springs, LLC and Pheasant Meadows, LLC acted as nominees to take title to property and transfer that title to the Plaintiffs, but Defendants argue that there was no relationship between those entities that created a fiduciary duty. At most there was a contractual, not a fiduciary, duty.

Furthermore, Defendants argue that while Simpson owed a fiduciary duty to LD III, LC or LD Ranch, LC to not put his interests above those of the entities, he fulfilled those duties. Defendants argue that there is no evidence that Simpson benefited from the transactions, and he delivered to the Plaintiffs the property they required for a horse ranch and equestrian center. He did not retain any of the property. Defendants argue that Simpson deeded property to Mackey and the owner of the Thornhill Parcel as a necessary trade to obtain the land on which to build the equestrian center.

Defendants argue that Simpson did not convert any of the property to his own use and that none of the Simpson Defendants ended up with any of the property. Defendants argue that there is no evidence that Simpson converted the property to his own use or that he was unjustly enriched by the property.

Defendants argue that there is no evidence of a conspiracy between the Simpson and Mackey, particularly because the Plaintiffs did not include the owners of the Thornhill Parcel. It was the owners of that parcel that required receipt of portions of the Mackey Parcel and the Crandall Parcel in order to sell the Thornhill Parcel. The Mackeys were only willing to transfer an interest in the Mackey Parcel if they received the Storrs/Olsen Parcels. Without the inclusion of the owners of the Thornhill Parcel, Plaintiffs cannot accurately allege a conspiracy. More importantly, Defendants argue, there is no evidence of a conspiracy. These were arms-length negotiated contracts, and there is no evidence to suggest otherwise.

Simpson Defendants argue that Plaintiffs' claims are barred by the statute of limitations. The statute of limitations for claims of fraud and negligent misrepresentation are governed by Utah Code Ann. § 78B-2-305(3), which says that an action "for relief on the ground of fraud or mistake" shall be brought within three years. Simpson Defendants argue that any claims of conversion, breach of fiduciary duties, unjust enrichment and conspiracy were barred within four years of each closing. Utah Code Ann. § 78B-2-307. The complaint was not filed until November 12, 2010 which is more than four years after each of the transactions.

The Storrs Parcel closed on February 15, 2006. The Crandall Parcel closed on March 3, 2006. The Olsen Parcel closed on July 3, 2006, and the last event to complete the closing of the Thornhill Parcel occurred on August 27, 2006. All of them were closed in the names of Wood Springs, LLC and Pheasant Meadows, LLC, as nominees. All of them were closed with the knowledge of Mower's agent, Ken Dolezsar on these very transactions. Mower's agent's knowledge is imputed to Mower.

Simpson Defendants argue that the closings constitute the time when Plaintiffs' causes of action would have accrued as that was the time any alleged damages would have been incurred,

and that therefore, the claims for fraud and negligent misrepresentation would have been barred as of August 27, 2009, more than a year before the complaint was filed. Additionally, any claims of conversion, breach of fiduciary duties, unjust enrichment and conspiracy were barred within four years of each closing, the latest of which would have been August 27, 2010. Utah Code Ann. §78B-2-307.

Finally, Simpson Defendants argue that the Plaintiffs received all of the property that was acquired for a horse ranch and equestrian center. The transfer of the 12-14 acres of the Mackey Parcel from the Mackeys to Plaintiffs is available upon Plaintiffs' acceptance of the deeds prepared to accomplish that transfer. Accordingly, there is no other property to transfer and Plaintiffs have no damages.

b. Plaintiffs' Arguments Opposing the Motion for Summary Judgment

Plaintiffs argue that the claims for fraud and negligent misrepresentation are based on Simpson's representation to Mower and LD Ranch that he transferred all of the property to LD Ranch that he acquired in Hobble Creek Canyon with Mower's and LD III's funds. Plaintiffs argue that the property transfer was not required for the Mackeys to convey property to the Thornhills or to Hobble Creek Investments.

Plaintiffs argue that Simpson was acting as a real estate agent for the Plaintiffs and took the title to property as nominee for Mower and LD Ranch. As such, fiduciary duties attached to the actions that Simpson took and the money he received through the transactions. Plaintiffs argue that he breached his fiduciary duties to Plaintiffs by misappropriating monies that were entrusted to him to purchase property in Hobble Creek Canyon and by conveying the Storrs and Nelson parcels to the Mackeys without any consideration, property he claims he purchased for Plaintiffs and conveyed to Plaintiffs on or after July 17, 2007.



Plaintiffs further argue that in addition to the foregoing, Simpson should be held accountable to the trier of fact for conveying property to the Mackeys. Simpson converted the property from Plaintiffs when he failed to convey the Storrs Parcel and the Nelson Parcel to Mower or LD Ranch. Since Simpson had no legal authority to transfer the converted property to Mackey, the transaction should be unwound and the Storrs and Nelson Parcels returned to Plaintiffs.

Therefore, the Plaintiffs argue that there is a genuine issue of material fact regarding the claims of fraud, negligent misrepresentation, the breach of fiduciary duties, and conversion such that a decision cannot be made on the issues as a matter of law.

In regards to the statute of limitations, Plaintiffs argue that they did not discover the causes of action for fraud and negligent misrepresentation until after the death of Ken Dolezsar on November 15, 2007 and the statute of limitations tolled "until the discovery of facts forming the basis for the cause of action." *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981).

Finally, Plaintiffs argue that they were damaged by Simpson Defendants' actions when Plaintiffs paid \$190,000 for the Storrs Parcel and it was given by Simpson to the Mackeys. Plaintiffs were damaged when they paid \$105,000 for the Nelson Parcel and Simpson Defendants gave that property to the Mackeys. In addition, Plaintiffs argue that they were damaged by Simpson taking money from Plaintiffs for the purchase of property in Hobbie Creek Canyon and not accounting for the money taken nor conveying any such property to Plaintiffs for nearly two years from the time money was received until the property was conveyed.

#### **IV. Facts**

Rule 7(c)(3)(B) of the Utah Rules of Civil procedure provide that a party opposing a motion for summary judgment is required to set forth a "verbatim restatement of each of the

moving party's facts that is controverted" and for each one, the "opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials."

The Court notes that each and every one of the 19 statements of undisputed facts set forth in the Simpson Defendants' Memorandum in Support of Motion for Summary Judgment is supported by a combination of:

1. Very detailed citations to, or quotes from, various depositions;
2. Citations to numerous exhibits attached to the memorandum in support;
3. Citations to the Complaint.

The Plaintiffs' response to each of the 19 undisputed facts involves admissions, admissions in part, or total denials. They then set forth counter claimed facts. Notably, the Plaintiffs make no citation to any deposition, no citation to any affidavit, and no citation to any exhibit.

Furthermore, the Plaintiffs do not supportively challenge the interpretation of any relied upon testimony from any deposition; they do not claim the language was misinterpreted, taken out of context, or that any other depositional testimony was contrary in nature or content. They do not challenge any of the Simpson Defendants' citations.<sup>1</sup>

---

<sup>1</sup> Paragraph 1, Response: Admitted (no citations);  
Paragraph 2, Response: Denied (no citations);  
Paragraph 3, Response: Denied (no citations);  
Paragraph 4, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 5, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 6, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 7, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 8, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 9, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 10, Response: Denied (no citations);  
Paragraph 11, Response: Denied (no citations);  
Paragraph 12, Response: Denied (no citations);  
Paragraph 13, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 14, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 15, Response: Admitted in Part and Denied in Part (no citations);  
Paragraph 16, Response: Admitted in Part and Denied in Part (no citations);

In addition, the Plaintiffs, in their Memorandum in Opposition to Simpson Defendants' Motion for Summary Judgment, do set forth at pages 9-11, a **Statement of Additional Relevant Facts**. Certainly, a statement of additional relevant facts may highlight genuine issues of material fact. But additional facts must also be supported by proper citations if used by a party to attempt to defeat the facts that support the Defendants' Motion for Summary Judgment. Alarming, almost all of the statements of additional facts rely on the unsupported responses that lack any citational references. (see Additional Relevant Facts, paragraph No. 2-16, page 10-11). The citational failure noted above is, in fact, compounded by Plaintiffs; they cite unsupported facts to support additional facts.

The rule requires more than a denial or unsupported factual allegations; to defeat a motion for summary judgment, the opposing party must explain the basis for denial by providing citation to relevant materials. As the Plaintiffs have failed to cite any material to support the denials, the Simpson Defendants' facts are deemed admitted. Utah R. Civ. P. 7(c)(3)(A); *see also, Jensen v. Skypark Landowners Association*, 2013 UT App 48, ¶ 2, 299 P.3d 609.

Plaintiffs failed to properly dispute any of the undisputed facts set forth in the Simpson Defendants' Statement of Undisputed Facts. Accordingly, all of those facts are deemed admitted. Plaintiffs' attempt to incorporate additional facts by reference to the Declaration of Leslie Dee Mower ("Mower Declaration") is likewise futile as the declaration is inadmissible because it consists of nothing but statements directly contradicted by her prior deposition testimony and unsubstantiated opinions and conclusions. Accordingly, the Court adopts the following undisputed facts:

---

Paragraph 17, Response: Admitted (no citations);  
Paragraph 18, Response: Admitted in Part (no citations);  
Paragraph 19, Response: Admitted (no citations).

- 1) In 2005, Mower wanted to purchase enough property in Hobbie Creek Canyon for a horse ranch and equestrian center.
- 2) Mower's since deceased husband, Kenneth Dolezsar ("Dolezsar"), worked with David Simpson ("Simpson") to assemble and acquire enough property for a horse ranch and equestrian center and instructed that the properties be acquired in the name of nominees.
- 3) Simpson never had any conversations with Mower regarding the purchase and acquisition of any of the properties assembled by Simpson and Dolezsar for a horse ranch and equestrian center.
- 4) On or about March 3, 2005, Simpson, as the managing member of Wood Springs, LLC, as nominee, purchased approximately 268 acres of land in Hobbie Creek Canyon (the "Crandall Parcel" in connection with assembling property for the a horse ranch and equestrian center.
- 5) The purchase price of the Crandall Parcel was \$2,000,000 and was paid as follows:
  - a. \$200,000 to Carolyn Crandall;
  - b. \$200,000 to Joan Orton;
  - c. \$200,000 to Cathleen C. Lloyd; and
  - d. \$1,400,000 to Exchange Pro, Inc. as accommodator for Crandall Hobbie Creek Ranch, L.L.C., LaMar V. Crandall, operating manager.
- 6) On or about February 15, 2006, Wood Springs, LLC, as nominee, purchased additional property in Hobbie Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Storrs Parcel").
- 7) On or about July 3, 2006, Simpson as manager of Pheasant Meadows, LLC, as nominee, acquired additional property in Hobbie Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Olsen Parcel").

- 8) On or about March 23, 2006, Wood Springs, LLC, as nominee, entered into a Real Estate Purchase Contract for additional land in Hobble Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Thornhill Parcel"). The owner of the Thornhill Parcel, Hobble Creek Investments, agreed to sell the Thornhill Parcel in exchange for the following:
- a. \$1,750,000,
  - b. approximately 6.5 acres of the Crandall Parcel, and
  - c. approximately 4.5 acres of property owned by Kristin Mackey.
- 9) Previous to and independent of the effort to assemble property for a Mower horse ranch and equestrian center, on or about August 4, 2005, Kristin Mackey purchased approximately 49 acres of land in Hobble Creek Canyon (the "Mackey Parcel"). Approximately 33 acres were located on the west side of the road and approximately 16 acres was located on the east side of the road.
- 10) Kristen Mackey agreed to transfer 7.0 acres of her property interest to the owners of the Thornhill Parcel in exchange for the Storrs and Olsen Parcels. Mackey agreed to transfer to Mower or her interests 12 to 14 acres of the Mackey Parcel that were not necessary for obtaining a building permit for the Mackey Parcel from Utah County.
- 11) To acquire the Thornhill Parcel required a three way trade involving the Crandall Parcel, the Mackey Parcel and the Storrs/Olsen Parcels. The Storrs/Olsen Parcels were to be deeded to Mackey; Mackey would then transfer to the owners of the Thornhill Parcel an interest in the Mackey Parcel. Also, a portion of the Crandall Parcel would be deeded to the owner of the Thornhill Parcel.
- 12) The three-way trade occurred as follows:
- a. The Storrs Parcel was transferred to Mackey on August 24, 2006;

- b. The Olsen Parcel was transferred to Mackey on August 24, 2006;
  - c. Mackey transferred to the owner of the Thornhill Parcel a Right of Use Easement on August 27, 2006;
  - d. The 6.5 acres of the Crandall Parcel was transferred to the owner of the Thornhill Parcel on April 27, 2006;
  - e. On August 8, 2006, Simpson, on behalf of Wood Springs, LLC, as nominee, and Mackey executed an agreement (the "Reconveyance Agreement") whereby they agreed to transfer to Wood Springs the 12 to 14 acres of the Mackey Parcel that would not be necessary for Mackey to obtain a building permit on the remaining Mackey Parcel combined with the Storrs/Olsen Parcel;
- 13) The title to the Thornhill Parcel was transferred to Wood Springs, LLC, as nominee, on April 27, 2006.
- 14) LD, Ranch, LLC constructed an equestrian center on the Thornhill Parcel.
- 15) LD Ranch, LLC is a limited liability company of which Leslie Dee Mower is the sole member.
- 16) On or about July 17, 2007, Wood Springs transferred to LD Ranch, LLC all of the Thornhill Parcel and all of the Crandall Parcel less the 6.5 acres traded to acquire the Thornhill Parcel.
- 17) Mower has never accepted the deeds to the 12-14 acres from the Mackey Parcel.

## V.

### Case Analysis

With the adoption of the undisputed facts, the Court can now address the legal arguments.

The statute of limitations for claims of fraud and negligent misrepresentation are governed by Utah Code Ann. § 78B-2-305(3), which says that an action "for relief on the ground of fraud or mistake" shall be brought within three years. The claims of conversion, breach of fiduciary duties, unjust enrichment and conspiracy are governed by Utah Code Ann. § 78B-2-

307, requiring a claim to be brought within four years. Here, the complaint was not filed until November 12, 2010 which is more than four years after each of the transactions. The Storrs Parcel closed on February 15, 2006. The Crandall Parcel closed on March 3, 2006. The Olsen Parcel closed on July 3, 2006, and the last event to complete the closing of the Thornhill Parcel occurred on August 27, 2006.

The closings constitute the time when Plaintiffs' causes of action would have accrued as that was the time any alleged damages would have been incurred. Dolezsar, Mower's agent, was aware of the details of each of these transactions, and his knowledge is imputed to Mower. Therefore, the claims for fraud and negligent misrepresentation would have been barred as of August 27, 2009, more than a year before the complaint was filed. Any claims of conversion, breach of fiduciary duties, unjust enrichment and conspiracy were barred within four years of each closing, the latest of which would have been August 27, 2010. Accordingly, Plaintiffs' claims are barred by the statute of limitations.

Additionally, although the Plaintiffs have disputed the facts, they have not provided any evidence or any citations to depositions or affidavits to show that the Simpson Defendants engaged in fraud, negligent misrepresentation, a breach of fiduciary duties, or conspiracy. The information cited to the Court demonstrates that Mower's agent, Dolezsar, was privy to the transactions that took place, and furthermore, that the Simpson Defendants themselves did not make any representations to Mower or unjustly benefit from the transactions that took place.

## **VI.**

### **Ruling**

Based on the foregoing, as a matter of law, the Court grants the Simpson Defendants' Motion for Summary Judgment.

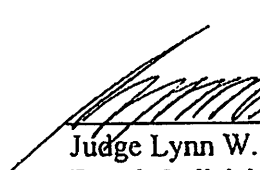
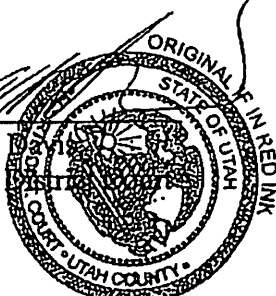
VII.

Order of Dismissal

- Plaintiffs' claims for fraud and misrepresentation are hereby dismissed as to the Simpson Defendants.
- Plaintiffs' claim of conversion is hereby dismissed as to the Simpson Defendants.
- Plaintiffs' claim that Defendants were unjustly enriched is hereby dismissed as to the Simpson Defendants.
- Plaintiffs' claim of conspiracy is hereby dismissed as to the Simpson Defendants.
- Plaintiffs' claim of breach of a fiduciary duty is hereby dismissed as to the Simpson Defendants.

Dated this 21<sup>st</sup> day of Aug., 2014.

By the Court,

  
Judge Lynn W. Smith  
Fourth Judicial District  




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100403908 by the method and on the date specified.

EMAIL: BART J BAILEY  
EMAIL: CRAIG CARLILE  
EMAIL: DANIEL B GARRIOTT  
EMAIL: TAHNEE L HAMILTON  
EMAIL: AARON R HARRIS  
EMAIL: STEVEN R PAUL  
EMAIL: STEPHEN QUESENBERRY  
EMAIL: DENVER C SNUFFER

08/21/2014

Date: \_\_\_\_\_

/s/ RAELENE CHRISTENSEN

\_\_\_\_\_  
Deputy Court Clerk

# ADDENDUM 5

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company;

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KIRSTEN W. MACKEY, an  
individual; DEAN MACKEY; an individual;  
and DOES 1-10

Defendants.

**PLAINTIFFS' MOTION TO  
RECONSIDER RULING ON SIMPSON  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Civil No. 100403908

Judge Lynn W. Davis

---

Plaintiffs Leslie D, Mower, LD III, LLC, and LD RANCH, LLC, by and through their  
counsel of record, move this Court to reconsider its Ruling on the Simpson Defendants' Motion for  
Summary Judgment. Under Rule 56, there are genuine issues of material facts evident in the record

and the Court has weighed the evidence in the record, which is inappropriate at the summary judgment stage. The disputed facts are enough to preclude summary judgment.

Plaintiffs submitted declarations in support of the Statement of Additional Facts by Plaintiff and in opposition to Defendants' statement of facts. These cannot be weighed, but must be accepted as true when considering a summary judgment motion.

The Declaration of Leslie Dee Mower was disregarded by the Court as "futile as the declaration is inadmissible because it consists of nothing but statements directly contradicted by her prior deposition testimony and unsubstantiated opinions and conclusions" without any specific finding. The conclusion the declaration "directly contradicted" her deposition is not supported by any of the required specific findings or analysis. When taken in context, Ms. Mower's deposition testimony and written declaration are consistent.

Given the disputed issues of fact demonstrated by Ms. Mower's declaration and the other supporting materials submitted in opposition to Simpson's motion for summary judgment, the Court should reconsider its ruling and deny summary judgment and allow the parties to proceed to trial on the merits of their claims.

This motion is supported by the accompanying Memorandum in Support of Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment and the exhibits attached thereto.

DATED this 4<sup>th</sup> day of September, 2014.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

/s/ Steven R. Paul

Denver C. Snuffer, Jr.

Steven R. Paul

Daniel B. Garriott

Tahnee L. Hamilton

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC  
and LD Ranch, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing **MOTION TO RECONSIDER RULING ON SIMPSON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** via email through JudicialLink to the following:

Craig Carlile  
Ray, Quinney & Nebeker, PC  
86 North University Ave., #430  
Provo, UT 84601-4420  
*Attorneys for Defendants David R. Simpson,  
Landmark Real Estate, inc., Wood Springs,  
LLC, and Pheasant Meadows, LLC*

Sent via:  
☐ Mail  
☐ Facsimile  
☐ Hand-delivery  
☒ Electronic Service via Utah Court's e-filing program

Stephen Quesenberry  
Aaron R. Harris  
Durham, Jones & Pinegar, P.C.  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, UT 84604-5663  
*Attorneys for Defendants Dean Mackey and  
Kirsten W. Mackey*

Sent via:  
☐ Mail  
☐ Facsimile  
☐ Hand-delivery  
☒ Electronic Service via Utah Court's e-filing program

DATED this 4<sup>th</sup> day of September, 2014.

/s/ Steven R. Paul

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company;

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KIRSTEN W. MACKEY, an  
individual; DEAN MACKEY; an individual;  
and DOES 1-10

Defendants.

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION TO  
RECONSIDER RULING ON SIMPSON  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Civil No. 100403908

Judge Lynn W. Davis

---

Plaintiffs Leslie D., Mower, LD III, LLC, and LD RANCH, LLC, move this Court to  
reconsider its Ruling on the Simpson Defendants' Motion for Summary Judgment. Under Rule 56

there are genuine issues of material facts evident in the record, and it is inappropriate to weigh disputed evidence since the dispute itself is enough to preclude summary judgment.

There were affidavits on file to support the Statement of Additional Facts and in opposition to Defendant's statement of facts. These cannot be weighed, but must be accepted as true when considering a summary judgment motion.

The Declaration of Leslie Dee Mower was disregarded by the Court as "futile as the declaration is inadmissible because it consists of nothing but statements directly contradicted by her prior deposition testimony and unsubstantiated opinions and conclusions." Without any specific finding, the conclusion the Declaration "directly contradicted" her deposition is not supported by any of the required specific findings or analysis. When taken in context, Ms. Mower's deposition and written declaration are consistent. Indeed, the deposition testimony related to one point in time (to which the questioner qualified his question) and the relevant time frame was earlier. Ken Dolezsar was only given power of attorney much later than the relevant events here. Further, the much later power of attorney was itself limited in scope (which was exceeded by his conduct acting on his own errand). His self-dealing cannot be used against a betrayed principal. There are disputed issues of fact.

#### **DISPUTED ISSUES OF FACT**

The following are disputed issues of fact from Simpson's Motion for Summary Judgment with citations to the record:

Simpson Paragraph 2:	Mower's since deceased husband, Kenneth Dolezsar ("Dolezsar"), worked with Simpson to assemble and acquire enough property for a horse ranch and equestrian center and instructed that the properties be acquired in the name of nominees.
----------------------	--



RESPONSE: Denied. There is no written support for Simpson's allegation that Dolezsar instructed or authorized Simpson to acquire property in Hobbie Creek Canyon in his own name or in the name of any entity he owned or controlled. Deposition of David Simpson ("Simpson Depo.") p. 49, Line 19 through p. 50, Line 1; p. 69, Lines 16-25<sup>1</sup>. Leslie D. Mower ("Mower") testified she did not authorize any such transaction or instruct Simpson take title to property in Hobbie Creek Canyon on her behalf in his name or through any nominee. Declaration of Leslie Dee Mower ("Mower Decl.") ¶ 4<sup>2</sup>. Therefore this was a theft, not an authorized act on her behalf.

Simpson Paragraph 3: Simpson was not acting as a real estate agent for either Dolezsar or Mower or any of Mower's entities.

RESPONSE: Denied. Simpson was not acting for his own benefit. Simpson Depo. pp. 25, 30, 35, 38, 44, 47-50, and 63. Simpson was, at all relevant times, a licensed real estate agent and/or broker in the State of Utah. Simpson Depo. pp. 7-9. And, Simpson admitted he "found suitable real property in Hobbie Creek Canyon" for Ms. Mower, including The Thornhill and Crandall properties and the Storrs and Olsen properties. Simpson Depo. p. 30, Line 18 through p. 31, Line 6. Simpson also admits he negotiated the Thornhill property purchase Simpson Depo. p. 24, Line 19-20. Simpson also approached Paul Reeb to negotiate the purchase of the Thornhill property. Declaration of Paul Reeb ("Reeb Decl.") ¶ 8<sup>3</sup>. Therefore at a minimum there is a disputed issue of fact as to whether Simpson was acting in an agency position with regard to Ms. Mower, and a more appropriate conclusion was that he did act as an agent. If Simpson was not acting as a real estate

---

<sup>1</sup> Copies of the relevant pages from the Deposition of David Simpson are attached hereto as Exhibit A.

<sup>2</sup> A copy of the Declaration of Leslie Dee Mower is attached hereto as Exhibit B.

<sup>3</sup> A copy of the Declaration of Paul Reeb is attached hereto as Exhibit C.

agent, what was he doing? The only reasonable conclusion is that he WAS an agent acting in that capacity at the time, with all the associated responsibilities to his principal.

Simpson Paragraph 5: On or about March 3, 2006, David Simpson ("Simpson"), as the managing member of Wood Springs, LLC, as nominee, purchased approximately 268 acres of land in Hobble Creek Canyon (the "Crandall Parcel") in connection with assembling property for a horse ranch and equestrian center.

RESPONSE: Denied. Ms. Mower testified she did not authorize Simpson to act on behalf of Plaintiffs. See Mower Decl. ¶ 4-5. On or about March 3, 2006, Wood Springs, LLC, took title to the Crandall Parcel. However, Plaintiffs deny Simpson was authorized to take title to any real property as an authorized nominee of Plaintiffs or that the transaction was authorized or sanctioned by Plaintiffs. As stated above, there is no written direction to authorize Simpson to act as nominee for Plaintiffs. Simpson Depo. p. 49, Line 19 through page 50, Line 1; p. 69, Lines 16-25. With no writing, there is necessarily a genuine issue of material fact as to whether Simpson was authorized to act for Plaintiffs and whether Simpson acted within whatever authority he claims, including the duty to protect Mower as a fiduciary when acting as her purported agent.

Simpson Paragraph 7: On or about February 15, 2006, Wood Springs, LLC, as nominee, purchased additional property in Hobble Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Storrs Parcel").

RESPONSE: Denied. See response to Simpson Paragraph 5, above.

Simpson Paragraph 8: On or about July 3, 2006, Simpson, as manager of Pheasant Meadows, LLC, as nominee, acquired additional property in Hobble Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Olsen Parcel").

RESPONSE: Denied. See response to Simpson Paragraph 5, above.

Simpson Paragraph 9: On or about March 23, 2006, Wood Springs, LLC, as nominee, entered into a Real Estate Purchase Contract for additional land in Hobbie Creek Canyon in connection with assembling property for a horse ranch and equestrian center (the "Thornhill Parcel"). The owner of the Thornhill Parcel, Hobbie Creek Investments, agreed to sell the Thornhill Parcel in exchange for the following: (a) \$1,750,000, (b) approximately 6.5 acres of the Crandall Parcel, and (c) approximately 4.5 acres of property owned by Kristin Mackey.

RESPONSE: Denied. See response to Simpson Paragraph 5, above. Furthermore, Hobbie Creek Investments, LLC did not demand any real property owned by Mackey as part of the real estate transaction. See Declaration of Paul Reeb ("Reeb Decl.") ¶ 10 and 14.

Simpson Paragraph 11: Kristin Mackey agreed to transfer 7.0 acres of her property interest to the owners of the Thornhill Parcel in exchange for the Storrs and Olsen Parcels. Mackey agreed to transfer to Mower or her interests 12 to 14 acres of the Mackey Parcel that were not necessary for obtaining a building permit for the Mackey Parcel from Utah County.

RESPONSE: Denied. In his motion, Simpson relies on the transfer of the 7 acres of the Mackey Parcel as essential to the acquisition of the Thornhill Parcel. However, Paul Reeb testified that Hobbie Creek Investments, LLC would have transferred the Thornhill Parcel to Plaintiffs with the reservation of *any* 10 acre parcel. Reeb Decl. ¶ 10-13. Hobbie Creek Investments did not demand the 4.5 acres from the Mackey Parcel and would have taken any property contiguous to its own to make up the 10 total acres. Id. at ¶ 14.

Simpson Paragraph 12: To acquire the Thornhill Parcel required a three way trade involving the Crandall Parcel, the Mackey Parcel and the Storrs/Olsen Parcels. The Storrs/Olsen Parcels were to be deeded to Mackey; Mackey would then transfer to the owners of the Thornhill Parcel an interest in the Mackey Parcel. Also, a portion of the Crandall Parcel would be deeded to the owner of the Thornhill Parcel.

RESPONSE: Denied. See response to Simpson Paragraph 11, above.

Simpson Paragraph 13: The three-way trade occurred as follows: (a) The Storrs Parcel was transferred to Mackey on August 24, 2006; (b) The Olsen Parcel was transferred to Mackey on August 24, 2006; (c) Mackey transferred to the owner of the Thornhill Parcel a Right of Use Easement on August 27, 2006; (d) The 6.5 acres of the Crandall Parcel was transferred to the owner of the Thornhill Parcel on April 27, 2006; and (e) On August 8, 2006, Simpson, on behalf of Wood Springs, LLC, as nominee, and Mackey executed an agreement (the "Reconveyance Agreement") whereby they agreed to transfer to Wood Springs the 12 to 14 acres of the Mackey Parcel that would not be necessary for Mackey to obtain a building permit on the remaining Mackey Parcel combined with the Storrs/Olsen Parcel.

RESPONSE: The real property transactions occurred in essentially the manner described. However, such transactions were not necessary to effect the purposes of acquiring property for the horse ranch and equestrian center. Simpson approached Hobble Creek Investments, LLC to purchase the Thornhill Parcel. Reeb Decl. ¶ 8. Hobble Creek Investments, LLC agreed to sell the Thornhill Parcel, reserving 10 acres for itself. Reeb Decl. ¶ 9. Hobble Creek Investments, LLC did not demand any portion of the Mackey Parcel and would have agreed to any 10 acres adjoining its existing holdings in the canyon. Reeb Decl. ¶ 10. Further, Ms. Mower testified Simpson was not authorized to act as a nominee for Plaintiffs (See Response to Simpson Paragraph 5, above). Mower rejected Mackey's attempted Reconveyance Agreement. Deposition of Leslie Mower ("Mower Depo.") at p. 77, Lines 7-25; page 83, Lines 1-25<sup>4</sup>.

Mackey Paragraph 14: The title to the Thornhill Parcel was transferred to Wood Springs, LLC, as nominee, on April 27, 2006.

---

<sup>4</sup> Copies of the relevant pages from the Deposition of Leslie D. Mower are attached hereto as Exhibit D.

RESPONSE: Denied. See response to Simpson Paragraph 5, above.

### **STATEMENT OF ADDITIONAL DISPUTED FACTS**

In addition to the foregoing disputed facts from Simpson Defendants' Motion for Summary Judgment, Plaintiff's relied on the following specifically disputed facts which are (and were) supported by the record in this case:

**Plaintiffs' Fact No. 3:** Plaintiffs did not discover the underlying transactions until after the death of Kenneth Dolezsar, which occurred November 15, 2007. Mower Decl. ¶ 9; Mower Depo. pp. 76, Lines 10-18.

**Plaintiffs' Fact No. 6:** On July 17, 2007, Simpson represented to Plaintiffs he had transferred all the property to LD Ranch he acquired in Hobbie Creek Canyon with Mower's or LD III's funds. Mower Decl. 10; Mower Depo. p. 87, Line 23 through p. 88, Line 5.

**Plaintiffs' Fact No. 7:** The representation is untrue because Simpson did not convey to Plaintiffs the Storr's Parcel or the Nelson Parcel. Mower Decl. ¶ 11; Simpson Depo. p. 103, Line 14 through p. 104, Line 4; p. 109, Lines 9 to 18.

**Plaintiffs' Fact No. 8:** Prior to Simpson offering to purchase the Thornhill Parcel, Hobbie Creek Investments, LLC, acquired a right of first refusal to purchase the Thornhill Parcel from Thornhills. Reeb Decl. ¶ 6.

**Plaintiffs' Fact No. 9:** Hobbie Creek Investments had contracted with Thornhills to purchase the Thornhill parcel for \$1,500,000. Reeb Decl. ¶ 7.

**Plaintiffs' Fact No. 10:** Simpson approached Hobbie Creek Investments to purchase the Thornhill Parcel, including the release of the right of first refusal. Reeb Decl. ¶ 8.

**Plaintiffs' Fact No. 11:** Hobble Creek Investments told Simpson it would exercise its right of first refusal and purchase the Thornhill Parcel, then it would immediately convey the Thornhill Parcel to Simpson (or his assigns). To do that, Hobble Creek Investments required payment of \$1,750,000 and approximately 10 acres of property that adjoined its current holdings in the canyon to convey the property to Simpson. Reeb Decl. ¶ 9.

**Plaintiffs' Fact No. 12:** Hobble Creek Investments did not express a preference for any particular parcel. Reeb Decl. ¶ 10.

**Plaintiffs' Fact No. 13:** It merely expressed its need for approximately 10 acres contiguous to its other property in the canyon. Reeb Decl. ¶ 11.

**Plaintiffs' Fact No. 14:** Hobble Creek Investments informed Simpson that it required the property to be a buffer to prevent construction of other homes or structures near the current property lines of property it already owned in the canyon. Reeb Decl. ¶ 12.

**Plaintiffs' Fact No. 15:** Simpson proposed that Hobble Creeks Investments receive a 6.5 acre parcel included in the Crandall Parcel and 4.5 acres from the Mackey Parcel as consideration for selling the Thornhill Parcel. Reeb Decl. ¶ 13.

**Plaintiffs' Fact No. 16:** Hobble Creek Investments did not demand the 4.5 acres from the Mackey Parcel and would have taken any 10 total acres. Reeb Decl. ¶ 14.

Following the hearing on May 14, 2014, this Court requested additional briefing regarding the Power of Attorney given to Ken Dolezsar and other matters involving his conflict of interests with Ms. Mower and Plaintiffs. The following additional facts were submitted to the Court for consideration in light of the Simpson Defendants' Motion for Summary Judgment, which are (and were prior to the Court's ruling granting summary judgment) part of the record in this case:

**Plaintiffs' Additional Fact No. 1:** Ken Dolezsar was not given a power of attorney to act on Ms. Mower's behalf until January 10, 2007. See Memorandum and Exhibits Requested by the Court, filed on May 19, 2014, Exhibit 1. A copy of the Power of Attorney is attached hereto as Exhibit E.

**Plaintiffs' Additional Fact No. 2:** The power of attorney did not permit Mr. Dolezsar to act in his own self-interest. Id.

**Plaintiffs' Additional Fact No. 3:** When asked in her deposition about giving Mr. Dolezsar a power of attorney, the question was not confined to any specific date. Mower Depo. pp. 37-38, but was clarified that she held onto it until she went to prison on March 1, 2007. Mower Depo. p. 103, Line 13-21 and p. 22, Lines 4-16. Ms. Mower was in prison from March 1, 2007 to April 2008. Id.

**Plaintiffs' Additional Fact No. 4:** Based on the pre-nuptial agreement between Dolezsar and Ms. Mower, Dolezsar did not obtain any interest in his wife's estate. See Memorandum and Exhibits Requested by the Court, filed on May 19, 2014, Exhibit 2. A copy of the Power of Pre-nuptial Agreement is attached hereto as Exhibit F. It is reasonable to conclude he was tempted and succumbed to the conspiracy with Mr. Simpson to convert property from his wife's estate into his own name. See Memorandum and Exhibits Requested by the Court, filed May 19, 2014, page 2.

**Plaintiffs' Additional Fact No. 5:** Dean Mackey testified he received the Storrs and Olsen parcels because of "it was my effort - - my contribution was obtaining the property and obtaining permission and the agreements of those then property owners to surrender their ownership. That was my portion of the investment of obtaining those properties." Deposition of Dean Mackey

(“Mackey Depo.”) p. 38, Lines 18-22<sup>5</sup>. This testimony contradicts Simpson Defendants’ argument that the property transaction was essential to acquire the Thornhill parcel, yet is consistent with Paul Reeb’s testimony.

**Plaintiffs’ Additional Fact No. 6:** Dean Mackey testified that David Simpson compensated Mackeys for the work he had done by giving them the property adjoining the property they already owned. Mackey Depo. p. 40.

**Plaintiffs’ Additional Fact No. 7:** Dean Mackey testified: “. . . our compensation was in lieu of cash and it was in the form of privacy on the piece that we now have. Rather than us build where the ranch now sits, we decided that we wanted to be where we’re at, that we wanted to have peace and privacy without the additional property owners that were up on our plateau.” Id.

**Plaintiffs’ Additional Fact No. 8:** On or about August 23, 2006, Mackeys received title to approximately 19 acres commonly referred to as the Storrs Property. Id. at 44-47 and Exhibit 17.

**Plaintiffs’ Additional Fact No. 9:** Mackeys did not pay for the Storrs Property. Id. at 47.

**Plaintiffs’ Additional Fact No. 10:** Dean Mackey testified he received the Storrs Property “in lieu of the profits that we would have shared and divided by developing the 11 acre lot – or the 11 building lots.” Id. at Lines 10-12.

**Plaintiffs’ Additional Fact No. 11:** Dean Mackey testified he understood Ken Dolezsar gave David Simpson permission to buy the Storrs Property for Mackeys to “compensate us for our efforts in putting the properties now together that they had purchased.” Id. at lines 21-24.

---

<sup>5</sup> Copies of the relevant pages from the Deposition of Dean Mackey are attached hereto as Exhibit G.



**Plaintiffs' Additional Fact No. 12:** Also on or about August 23, 2006, Mackeys received title to approximately 12 acres commonly referred to as the Olsen Parcel. Id. at 47-50 and Exhibit 18.

**Plaintiffs' Additional Fact No. 13:** Mackeys did not pay for the Olsen Parcel. Id.

### ARGUMENT

"While a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision." *IHC Health Services, Inc. v. D & K Managment, Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588, 596. Summary Judgment is only appropriate "when, viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Suarez v. Grand County*, 2012 UT 72, ¶18; Utah R. Civ. P. 56. If there is any "dispute as to any issue of fact which would be determinative of the rights of the parties, it should be denied and a trial should be had to resolve the disputed issues." *Transamerica Title Ins. Co. v. United Resources, Inc.*, 471 P.2d 165, 167 (Utah 1970). The Court must also construe all facts and reasonable inferences in a light favorable to the non-moving party. *USA Power, LLC v. PacifiCorp*, 2010 UT 31, ¶33.

**I. Did Ken Dolezsar Exceed/Violate His Authorization from Leslie D. Mower and Betray His Principal by Failing to Disclose Vital Information to Her?**

In Defendants' Motion for Summary Judgment, they argue Ken Dolezsar approached Simpson for help in assembling property in Hobbie Creek Canyon for a horse ranch and equestrian center. (See Defendants' Memorandum p. 2). Yet, Defendants do not claim Simpson ever received direction from Ms. Mower. Simpson's claim he "told" Dolezsar is not the same thing as telling Mower. He can tell Dolezsar without Dolezsar ever telling Mower. Mower said she was not told.

Mower Decl. ¶ 7-8. So this betrays the very basis upon which the Court relies to impute knowledge. Concluding Dolezsar was "an agent" is not the same thing as concluding the agent performed in accordance with the fiduciary duty imposed upon him. Therefore it is a question of fact whether the "agent" performed and knowledge was passed. If it was not passed, then there is nothing to impute.

Defendants claim the key parcel to putting together the horse property for Ms. Mower was the Thornhill parcel. Defendants' Memorandum, P. 2. Defendants claim the Thornhill parcel could not be acquired without transferring property acquired by Plaintiffs to Mackeys. *Id.*

Plaintiffs' claims for fraud and negligent misrepresentation against Simpson are based on representations from Simpson that he transferred all of the property to Plaintiffs that he acquired in Hobble Creek Canyon with Plaintiffs' funds. (See Ruling on Simpson Defendants' Motion for Summary Judgment, p. 6). Plaintiffs argue the failure to transfer the Storrs and Olsen Parcels to Plaintiffs support the claims against Simpson in the Complaint. *Id.* In particular, Plaintiffs argue the property transfer was not required for the Mackeys to convey property to the Thornhills or to Hobble Creek Investments. *Id.*

When the Court granted Summary Judgment to Defendants based on the running of the statute of limitations, the Court determined that the statute of limitations began to run from the date of closing of the property transactions. *Id.* at p. 13. The Court found that Dolezsar was Ms. Mower's agent. *Id.* It also concluded, because Dolezsar was aware of the details of each of the transactions, his knowledge is imputed to Mower. *Id.* This conclusion by the Court fails to recognize there are genuine issues of material fact that preclude summary judgment, in particular, whether Dolezsar was an agent of Ms. Mower and whether his knowledge at the time of closing can be imputed to Ms. Mower.

Defendants simply rely on Dolezsar's presence and participation in the transactions as the basis for his agency relationship. Nothing in Defendants' statement of facts supports a conclusion that Dolezsar was the agent for Mower and that his knowledge of the Thornhill transaction should be imputed to Mower. Instead, in Plaintiffs' opposition, Plaintiffs deny that Dolezsar was given authority to acquire property in the name of Simpson or his entities. Declaration of Leslie Dee Mower, ¶4-5 ("I specifically did not authorize or instruct David Simpson to use my funds to acquire real property in Hobbie Creek Canyon and to title the real property in his name or in the name of an entity which he owned or controlled. I never authorized or instructed Ken Dolezsar to have David Simpson title property in David Simpson's name or in the name of an entity he owned or controlled.") Furthermore, the Power of Attorney Defendants rely on in their allegations and arguments was shown to have been given after all of the Hobbie Creek property transactions were concluded. (See Exhibit E hereto).

Plaintiffs opposition to summary judgment is based on the argument that Dolezsar was not authorized to participate in a scheme to deprive Mower of property she paid for that was never received. Meaning, even if Dolezsar was considered an agent for purposes of putting together property for a horse ranch, he breached that duty to Ms. Mower by participating in a scheme that had the effect of paying for land (Storrs and Olsen parcels) that were given to Mackeys for less than equivalent value. To that end, Mower testified "I did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007." Id. at ¶ 9. That statement of fact is uncontested.

Defendants challenge Ms. Mower's Declaration as being contradicted by her deposition testimony or, alternatively, as speculation or conclusion. However, none of the arguments made against Ms. Mower's Declaration goes to the point made, which is, Dolezsar was not authorized to participate in a scheme to deprive Mower of property she paid for. It was not in Ms. Mower's interest to permit the transactions here, and she was not questioned, consulted, or informed by Dolezsar about the transactions when they took place. (Mower Depo. p. 85). At the time he undertook the transactions, Dolezsar concealed the information and documentation from Ms. Mower to prevent her from knowing what he was doing. Id.

Ms. Mower's deposition testimony is consistent with the statements in her declaration:

Q. Do you have any reason to – did you have an understanding that Hobble Creek Investments would not sell the 98.24 acres unless they received this right of use easement from the Mackeys?

A. Heavens no. I didn't know any of the manipulation and the dealings that was going on. No one kept me informed whatsoever.

Mower Depo. p. 85 (Questioning by Craig Carlile).

Also:

Q. And were you aware that that was part of the consideration Hobble Creek Investments required in order to sell the 98.24 acres to you?

A. I was never discussed about any manipulation, any turning over property for property or in any of the dealings that went on with the ranch. I wish I had been but I wasn't.

Q. And Ken never told you any of that; right?

A. No, he did not."

Id. p. 89-90 (Questioning by C. Carlile).

Based on the Ms. Mower's Declaration and her deposition testimony that is consistent therewith, there exists a genuine issue of material fact as to whether Dolezsar was Ms. Mower's agent and whether he was acting within the scope of that agency when he failed to tell Ms. Mower

of the transactions wherein the Mackeys received the Storrs and Olsen parcels when they gave up an easement over 4.5 acres of their surplus property and when not allowing Simpson to purchase property in his own entity's name using Ms. Mower's money instead of purchasing it in Ms. Mower's name to prevent property from being dissipated.

If Dolezsar was not Ms. Mower's agent or concealed his dealings from Ms. Mower, then the statute of limitations would not have run against Plaintiffs' claims until Dolezsar's death when the true nature of the transactions finally came to light to Plaintiffs. Therefore summary judgment should not have been granted against Ms. Mower.

**II. The Declaration of Leslie Dee Mower is Admissible, Does Not Contradict Her Deposition Testimony and Does Not Contain Inadmissible Speculation or Conclusions.**

The Court should not conclude that the Ms. Mower's declaration is wholly inadmissible and should be completely disregarded. Ms. Mower's declaration is admissible. Assuming, *arguendo*, Ms. Mower testified in her deposition regarding similar events, differences between the declaration and deposition are not substantive and do not render the declaration inadmissible. The Declaration complies with Rule 54(e) and should therefore be considered by the Court.

The trial court cannot weigh contradictory evidence or determine credibility when deciding whether summary judgment is appropriate. *Fisher v. Davidhizar*, 2001 UT App 270, ¶ 15; *IHC Health Services v. D & K Management*, 2008 UT 73, ¶ 18 ([a] district court is precluded from granting summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case.").

**A. Power of Attorney.** Simpson argues that Dolezsar's actions bound Ms. Mower because he held a power of attorney. The record in this case shows the Power of Attorney was not signed until January 10, 2007 (See Exhibit E hereto), and Ms. Mower testified in her deposition (taken by

Mr. Carlile on February 21, 2013) she held onto the power of attorney until March 1, 2007. Mower Depo. p. 103.

In his motion for summary judgment, and specifically during the hearing on May 14, 2014, Simpson argued the general power of attorney given to Ken Dolezsar by Ms. Mower authorized Dolezsar to manage whatever affected Ms. Mower. (See Simpson Defendants' Reply Memorandum, dated May 1, 2014, page 4). Simpson argued that since Dolezsar had a general power of attorney, all the transactions done allegedly at his instruction through Mr. Simpson were authorized by Ms. Mower. This was the lynchpin of the Simpson's argument for summary judgment.

Therefore, Ms. Mower's statement in her declaration that "I never authorized or instructed Ken Dolezsar to have Davis Simpson title property in David Simpson's name or in the name of an entity he owned or controlled" is not contradicted by her deposition testimony or the power of attorney. Furthermore, the statement that "I did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007" is likewise a true statement that is not contradicted by the power of attorney or the deposition testimony (See Mower Deposition page 85, lines 19-25 and pages 89 to 90.)

The conflicting facts between Ms. Mower's declaration and Mr. Simpson's allegations create a question of fact about the Mackey real property transactions that precludes summary judgment. See *Best v. Daimler Chrysler Corp.*, 2006 UT App 304, ¶ 10 ("[I]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence, and it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact."

**B. Mower Declaration.** Paragraphs 10 and 11 of Ms. Mower's declaration are not challenged as contradictory to deposition testimony. Simpson only objects on a factual basis that "All of the properties that are the subject of this lawsuit were transferred to Mower's entity . . ." (Simpson Memorandum in Support of Motion to Strike, dated April 23, 2014, p. 6). Simpson also argues the statement cannot be the basis of fraud because there was no reliance on the statement, but does not support that statement with citation to any record. *Id.* at 7.

Paragraph 11 of Ms. Mower's declaration states "The representation [that Simpson represented to Mower he had transferred all of the property to LD Ranch he had acquired for it in Hobble Creek Canyon] is untrue because Simpson did not convey to me or to any of the Plaintiffs the Storrs' Parcel or the Nelson [Olsen] Parcel." Simpson's objection to paragraph 11 of the declaration is based on a claimed contradiction with Ms. Mower's deposition testimony, yet Simpson does not even quote the deposition. Instead, he says in full:

The Storrs and Olsen parcels were purchased with funds from the joint account of Mr. Dolezsar and Mower on checks signed by Mr. Dolezsar. *Id.* [Complaint and Exhibits 20-22 thereto] Those properties were traded to the Mackeys (the Mackeys had previously purchased the Nelson Parcel, see ¶ 6 above) who in turn transferred a portion of their property to Hobble Creek Investments, LLC as part of the purchase price for the Thornhill Parcel where Mower build her equestrian center. Whether acquired by purchase or trade, the properties were acquired and transferred to Mower and there is nothing false about the alleged statement.

*Id.* at page 7-8.

Nothing in Simpson's objection to paragraph 11 of Ms. Mower's declaration is contradicted by deposition testimony, is conclusory or is speculation. Simpson simply makes a fact-based objection. Given the factual dispute, a genuine issue of material fact exists over whether Simpson conveyed all the property he purchased on behalf of Plaintiffs in Hobble Creek Canyon to Plaintiffs.

Defendant says he did. Plaintiffs say he did not. Ergo, there is a dispute as to the facts that should preclude summary judgment. See URCP 56(c).

Rule 56 explains that supporting or opposing affidavits (which includes declarations upon oath, under Utah Code Anno. 46-5-101) are to be made on personal knowledge and shall set forth facts that are admissible in evidence. Ms. Mower's declaration fits the requirements of Rule 56 to be fully and completely considered by the Court. Ms. Mower testified to specific facts (to which she has first-hand knowledge) showing there is a genuine issue for trial. Specifically, that Simpson conveyed property to Mackeys that she paid for that was meant to be conveyed to Plaintiffs. Ms. Mower has stated that "Simpson represented to me and my lawyers, on or after July 17, 2007, that he had transferred all of the property to LD Ranch that he acquired in Hobbie Creek Canyon with my personal funds or LD III's funds." That is a statement of fact and is not contradicted by any prior statement under oath, including Ms. Mower's deposition.

Given the disputed issues of fact demonstrated by Ms. Mower's declaration and the other supporting materials submitted in opposition to Simpson's motion for summary judgment, the Court should reconsider its ruling and deny summary judgment and allow the parties to proceed to trial on the merits of their claims.



## CONCLUSION

For the reasons stated herein, Plaintiffs ask the Court to reconsider its ruling on the Simpson Defendants' Motion for Summary Judgment.

DATED this 4<sup>th</sup> day of September, 2014.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

/s/ Steven R. Paul  
Denver C. Snuffer, Jr.  
Steven R. Paul  
Daniel B. Garriott  
Tahnee L. Hamilton  
*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC  
and LD Ranch, LLC*

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER RULING ON SIMPSON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** via email through JudicialLink to the following:

Craig Carlile

Ray, Quinney & Nebeker, PC  
86 North University Ave., #430  
Provo, UT 84601-4420

*Attorneys for Defendants David R. Simpson,  
Landmark Real Estate, inc., Wood Springs, LLC,  
and Pheasant Meadows. LLC*

Sent via:

☐ Mail

☐ Facsimile

☐ Hand-delivery

☒ Electronic Service via Utah Court's e-filing program

Stephen Quesenberry

Aaron R. Harris  
Durham, Jones & Pinegar, P.C.  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, UT 84604-5663

*Attorneys for Defendants Dean Mackey and  
Kirsten W. Mackey*

Sent via:

☐ Mail

☐ Facsimile

☐ Hand-delivery

☒ Electronic Service via Utah Court's e-filing program

DATED this 4<sup>th</sup> of September, 2014.

/s/ Steven R. Paul

# EXHIBIT A

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

-----  
LESLIE D. MOWER, an individual,) )  
LD III, LLC, a Utah limited ) Case No. 100403908  
liability company; LD RANCH, ) )  
LLC, Utah limited liability ) )  
company; ) )  
Plaintiffs, ) Judge DAVIS  
 ) )  
vs. ) )  
 ) Deposition of:  
DAVID R. SIMPSON, an individual;) DAVID R. SIMPSON  
LANDMARK REAL ESTATE, INC., a ) )  
Utah corporation; WOOD SPRINGS, ) )  
LLC, Utah limited liability ) )  
company; PHEASANT MEADOWS, LLC, ) )  
a Utah limited liability ) )  
Company; KRISTIN W. MACKEY, an ) )  
individual; DEAN MACKEY, an ) )  
individual; and DOES 1-10, ) )  
Defendants. ) )  
-----

April 17th 2013

10:01 a.m.

Location: Law Offices of Bailey & Jennings  
584 South State Street, Orem, Utah 84058

Reporter: Katie Harmon, RPR, CSR

1 from high school to the present?

2 A. Graduated from Springville High and I have a  
3 real estate degree.

4 Q. When you say a "real estate degree," what does  
5 that mean?

6 A. It means I am a licensed real estate broker in  
7 the State of Utah.

8 Q. How long have you been a licensed broker?

9 A. I'm not sure.

10 Q. When did you first -- did you become a real  
11 estate agent before you were broker?

12 A. Yes.

13 Q. And do you recall about when that was?

14 A. 1990, approximately.

15 Q. What is your current employment?

16 A. Self-employed. I am the broker of Landmark  
17 Real Estate.

18 Q. How long have you been the broker of Landmark  
19 Real Estate?

20 A. I'm not sure the exact time.

21 Q. And is there any time when you were the broker  
22 for Landmark Real Estate or working as a real estate  
23 agent that you had other employment?

24 A. Yes.

25 Q. What was that?

1 A. I was the COO of Maakoa.

2 Q. And can you spell that for the court reporter?

3 A. M-A-A-K-O-A.

4 Q. And what was that?

5 A. It was an MLM.

6 Q. And who did you report to there?

7 A. I'm not sure.

8 Q. As the COO did you report to the CEO?

9 A. At times.

10 Q. And who was that?

11 A. We've had three of them.

12 Q. And who are they?

13 A. Bruce Davis. I can't even think of the other

14 people's names.

15 Q. And what time period were you the COO of

16 Maakoa?

17 A. 2009 to 2012.

18 Q. Are you doing anything else besides being a

19 real estate broker right now?

20 A. Real estate development.

21 Q. And what kind of real estate development are

22 you involved in currently?

23 A. Land development.

24 Q. Where would that be?

25 A. In the State of Utah.

1 Q. Where in the State of Utah?

2 A. All over in the State of Utah.

3 Q. For instance, give me the first one. What  
4 development are you --

5 A. We have a project in Saratoga Springs.

6 Q. And who is "we?"

7 A. Rob McKell and myself.

8 Q. And how many acres is that?

9 MR. CARLILE: Objection. Irrelevant. Beyond  
10 the scope of this project.

11 Q. Go ahead and answer.

12 A. It's approximately 900 acres plus.

13 Q. And is that residential?

14 A. Yes.

15 MR. JENNINGS: Go off the record for a minute.

16 (Off the record.)

17 Q. So the 900-acre development, is that  
18 residential?

19 A. Yes.

20 Q. What other developments are you involved in?

21 A. There's -- we're looking at one in Spanish  
22 Fork, a small one.

23 Q. Who is "we?"

24 A. Actually myself.

25 Q. Have you ever been charged with a crime other

1 buying these distressed properties we've talked about?

2 MR. CARLILE: Same objection.

3 A. Yes.

4 Q. And do you remember about when that was, when

5 Ken wanted to be involved and purchase the property?

6 A. Approximately 2006.

7 Q. Do you remember beginning? End?

8 A. It would be a guess.

9 Q. Best guess?

10 A. The first of 2006.

11 Q. So I want to talk about the Thornhill property

12 that was purchased. How was that property titled when

13 it was purchased?

14 A. I'm not sure.

15 Q. You don't know. Well, let me back up. When

16 the Thornhill property was purchased, were you involved

17 in that purchase?

18 A. Yes.

19 Q. Are you the one that negotiated the purchase?

20 A. Ken and I.

21 Q. And when the property was purchased you don't

22 know who owned it after it was purchased?

23 A. I'd have to look at documents.

24 Q. And the Crandall property, do you know how

25 that land was titled when it was purchased?



1 A. In Wood Springs.

2 Q. And why was it titled in Wood Springs?

3 A. Because I was acting as a nominee.

4 Q. Why were you acting as a nominee? What was  
5 the purpose of that?

6 A. That's the way Ken wanted it handled.

7 Q. And how long did the Crandall property  
8 remain -- well, let me back up.

9 It was titled in Wood Springs. How long did  
10 it remain titled in Wood Springs -- I need to back up  
11 once again.

12 It was transferred from Wood Springs to LD  
13 Ranch; is that true?

14 A. Yes.

15 Q. And how long did it remain in the name of Wood  
16 Springs?

17 A. I'm not sure.

18 Q. Do you know when it was transferred to LD  
19 Ranch?

20 A. I would have to look at the documents.

21 Q. And on the Thornhill Ranch, do you recall what  
22 kind of deed you got, whether it was a quitclaim or  
23 whatever? I should say Wood Springs got.

24 A. From?

25 Q. From Thornhills.

1 Simpson find and purchase real property in the Hobble  
2 Creek Canyon for Leslie."

3 If you look at your answer in Exhibit 2 on  
4 Paragraph 19 you deny that allegation. And my question  
5 is: What's the basis for your denial? What's incorrect  
6 about that?

7 A. I've wasn't acting as a real estate agent.

8 Q. What capacity were you acting?

9 A. As a nominee to assemble a property.

10 Q. And then in Paragraph 20 it alleges that  
11 Simpson agreed to act as Leslie's real estate agent and  
12 began looking for real property that was available in  
13 Hobble Creek Canyon.

14 Again, you've denied that and I'm assuming the  
15 basis is because you weren't actings as an agent; is  
16 that correct?

17 A. Correct.

18 Q. We're on Paragraph 21. It says, "On  
19 information and belief Simpson found suitable real  
20 property in Hobble Creek Canyon." Your answer to that  
21 is that you admit that. And so I'm just trying to make  
22 sure I understand.

23 The property that you found, that you admit  
24 you found, would that be the Thornhill and the Crandall  
25 property that we've been talking about?

1 A. Yes.

2 Q. Any other property?

3 A. The Storrs property and the Olsen property.

4 Q. And just to be clear, those pieces are now  
5 owned by the Mackeys; is that correct?

6 A. Yes.

7 Q. Paragraph 24 alleges "On December 20th 2005 a  
8 counter check was issued on LD III's account payable to  
9 Wood Springs in the amount of 2 million to purchase real  
10 property located in Hobble Creek Canyon. LD III check  
11 register notes, 'Land Hobble Creek.'"

12 Your answer to that is you don't have  
13 sufficient facts and information to form a belief to as  
14 to the truth of those allegations. Do you recall you  
15 previously testified that the Crandall property  
16 \$2 million was paid for that property? Do you recall  
17 how that was paid for?

18 A. Through these funds.

19 Q. Paragraph 25 alleges "On or about  
20 December 27th 2005 a check was issued from Leslie's  
21 personal account, payable to Wood Springs in the amount  
22 of \$190,000. The check register notes 'Thornhill  
23 Ranch.'" Again, you lacked facts and information to  
24 answer that one therefore you denied it.

25 Do you recall a check being issued payable to

1 was titled?

2 A. Yes, Wood Springs.

3 Q. And again, it was a \$190,000 check from Dee's  
4 personal account that purchased this property, correct?

5 A. Yes.

6 Q. What was the purpose of purchasing these two  
7 parcels?

8 A. To assemble property so that Dean Mackey could  
9 get a building site.

10 Q. So the purpose -- well, why were they deeded  
11 to Wood Springs?

12 A. I was acting as a nominee for Ken.

13 Q. Do you know if Mr. Storrs knew that ultimately  
14 Mackeys would end up with this property?

15 A. I don't know.

16 Q. Was there a closing held on this property on  
17 the purchase?

18 MR. CARLILE: Objection. Ambiguous.

19 A. Yes.

20 Q. Where was that held?

21 A. I'm not sure.

22 Q. Do you know who prepared the documents?

23 A. I'm not sure.

24 Q. Do you know who prepared this warranty deed?

25 A. Pro-Title did.

1 Go ahead and answer.

2 A. Yes.

3 Q. And where was that at? Do you remember?

4 A. At Pro-Title.

5 Q. Did they prepare the documents?

6 A. Yes.

7 Q. And do you know if Mr. Crandall of Crandall  
8 Hobble Creek Ranch ultimately knew it was Dee that was  
9 purchasing the property?

10 A. I'm not sure.

11 Q. And you acquired that property in the name of  
12 Wood Springs. Again, was that as a nominee?

13 A. Yes.

14 Q. Do you remember what kind of deed you received  
15 that or Wood Springs received?

16 A. I'm not sure, I'd have to look at the  
17 document.

18 Q. Paragraph 35 states, "Sometime after Simpson  
19 acquired the real property identified as Tax Serial  
20 No. 16:049:0001 he divided it into two separate parcels  
21 identified as follows: Tax Serial No. 16:049:0016  
22 approximately 114.41 acres. Tax Serial No. 16:057:0016  
23 approximately 6.52 acres."

24 In your answer to that you denied the  
25 allegations in that paragraph. What was the basis for

1 Q. And again, this property was purchased in the  
2 name of Wood Springs and again as a nominee. Is that  
3 your testimony?

4 A. Yes.

5 Q. Are you aware of if Hobble Creek Investments  
6 knew that it was ultimately Dee Mower that was  
7 purchasing this property?

8 A. I'm not sure.

9 Q. Was there any water that came with this  
10 property? Any water rights? Water shares?

11 A. Which property?

12 Q. We're talking about the Thornhill property  
13 that you got -- that was deeded from Hobble Creek  
14 Investments currently?

15 A. Not to my knowledge.

16 Q. And we talked about property that came from  
17 the Crandalls before. Was there any water that came  
18 with that property?

19 A. Just what water that was on the property.

20 Q. Do you recall how much that was?

21 A. It was represented to us that there was no  
22 water and then with the further research that I did we  
23 established through Jim Riley that there was more water.

24 Q. And Jim Riley, who is he?

25 A. Used to be the old state water right engineer.

1 Q. And who did acquire that property?

2 A. I'd have to look at the deeds.

3 Q. We can do that.

4 (Deposition Exhibit No. 8 was received into evidence.)

5 Q. I've handed you what's been marked as  
6 Exhibit 8. It's a warranty deed from Julia Pearl  
7 Rouette Nelson Olson AKA Julia Pearl Rouette Nelson  
8 Olsen. With Olsen spelled different ways. To Pheasant  
9 Meadows. So does that refresh your memory of how that  
10 land was titled?

11 A. Yes.

12 Q. And what funds were you used to purchase this  
13 land?

14 A. I'd have to look at the documents.

15 Q. And why was the property acquired in the name  
16 of Pheasant Meadows?

17 A. As a nominee.

18 Q. And previously you acquired property in the  
19 name of Wood Springs and this time this one is acquired  
20 in Pheasant Meadows. Why was that?

21 A. As a nominee.

22 Q. Not my question. You'd previously acquired  
23 the property in the name of Wood Springs. This time you  
24 didn't use Wood Springs, you put it in Pheasant Meadows  
25 as a nominee. Why not Wood Springs?

1 A. Just for another nominee.

2 Q. Do you recall about how many acres this parcel  
3 was?

4 A. I believe it's 9 acres.

5 Q. Do you remember you purchased previously --  
6 Wood Springs purchased the two parcels from Storrs?

7 A. Yes.

8 Q. Do you recall how many acres those were total?

9 A. 21 acres.

10 Q. And your previous testimony was they were  
11 purchased so that Mackeys would have enough property to  
12 build a home; is that correct?

13 A. Correct.

14 Q. And do you know what the requirements were,  
15 how much property they needed to build a home?

16 A. 50 acres.

17 Q. Do you know how much property they owned, the  
18 Mackeys? Do you know how many property they owned  
19 before they got these other parcels?

20 A. 49 acres.

21 Q. And that included 16 acres that would be on  
22 the other side of the road, correct?

23 A. Correct.

24 Q. So approximately 33 acres that was on what  
25 would be the west side of the road?



1 A. Correct.

2 Q. And you bought the property from Storrs. And  
3 again, how much do you think that was?

4 MR. CARLILE: Price or value?

5 MR. JENNINGS: Sorry, good question.

6 Q. How many acres?

7 A. Okay. Storrs was 21 acres, the two parcels.

8 Q. So if they hadn't gotten this parcel from  
9 Ms. Nelson-Olsen they still would have had 50 acres; is  
10 that correct?

11 A. Yes.

12 Q. So why did they need this property?

13 A. It was --

14 Q. If you know.

15 A. I don't know.

16 Q. Was there any water that came with this  
17 property, the Olsen property?

18 A. I'm not sure.

19 Q. You said that the property was purchased in  
20 the name of Pheasant Meadows as a nominee. Who  
21 authorized that property to be purchased as a nominee in  
22 the name of Pheasant Meadows?

23 A. Ken Dolezsar.

24 Q. And is there any written communications  
25 regarding that?

1 A. No.

2 Q. Are you familiar with the zoning requirements  
3 to build a residence in Hobble Creek?

4 A. Yes.

5 Q. And what are they?

6 A. It depends on the zone.

7 Q. And the property where the Mackeys' home is  
8 located on the -- well, let me rephrase that. The  
9 Mackeys' 33 acres, the Storrs property that was  
10 purchased and the Olsen property, are they in the same  
11 zone? Do you know?

12 A. Yes.

13 Q. And what are the requirements for that?

14 A. It's a 50-acre zone.

15 Q. Is there a frontage requirement, too?

16 A. There is.

17 Q. What is that?

18 A. I think it's 330 feet or 250, I'm not sure.

19 Q. So in Paragraph 42 we allege that "The  
20 Mackeys' real property is located in CE-1 Zone, which  
21 requires it then meet certain area, within the road  
22 frontage requirement to build a house on the real  
23 estate." In your answer you said you didn't have  
24 knowledge and belief as to form a belief to that.  
25 But we've just talked what those are so you

1 A. That he wanted to make sure that he had a lot  
2 then.

3 Q. Did he specify a particular lot?

4 A. On the north end of the property. He actually  
5 looked at several different options but he settled on  
6 the north.

7 Q. Would that be about where his home is located  
8 today?

9 A. Yes.

10 Q. From Interrogatory 13 asks you to identify  
11 what you did with the check issued to Wood Springs by LD  
12 III on December 27th 2005 in the amount of \$190,000 and  
13 we've looked at that check. As part of your answer  
14 describe why the check was given to Wood Springs and for  
15 what it was to be used.

16 And the answer is: "The funds were used to  
17 acquire approximately 31 acres from Julia Olsen and  
18 Norven W. Storrs. The check was issued to Wood Springs  
19 as directed by Ken Dolezsar to acquire the property as a  
20 nominee so as not to disclose that the purchaser was  
21 Leslie D. Mower or an entity in which she held an  
22 interest."

23 So was this direction you received from Ken,  
24 was that all oral or was there anything written?

25 A. It would be all oral.

1 than a traffic offense?

2 A. No.

3 Q. Other than this matter or other matters  
4 involving the plaintiffs in this matter, have you been  
5 sued before?

6 A. Yes.

7 Q. And how many times?

8 A. Once.

9 Q. And who was the plaintiff?

10 A. Mike Avignon.

11 Q. And do you know where that case was filed?

12 What court?

13 A. Fourth District Court.

14 Q. In Provo?

15 A. Yes.

16 Q. When was that filed? Do you know?

17 A. I don't know.

18 Q. Other than that, there is no other matters  
19 that you can recall?

20 A. No.

21 Q. Are you a member of any LLCs?

22 A. Yes.

23 Q. Can you tell me what those are?

24 A. Go through all of them?

25 Q. To the best of your recollection.

1 Norven Storrs. Are those the two pieces that were  
2 bought from Norven Storrs that the Mackeys ended up  
3 with?

4 A. Yes.

5 Q. Then on the right-hand side there is a piece  
6 that says "Clark W. Nelson."

7 A. Yes.

8 Q. And there is a orange highlight. Do you know  
9 what that orange highlight indicates?

10 A. Yes. That's the property that was given to  
11 Thornhill, Reeb, Hobble Creek Investments for the -- or  
12 for the -- to acquire the 98 acres.

13 Q. And then the land it says Clark W. Nelson and  
14 then to the left of that underneath Storrs is Clark W.  
15 Nelson. But that would be the property that Mackeys  
16 own; is that correct?

17 A. Correct.

18 Q. And then the parts that say LaMar Vernon  
19 Crandall on the left there, was that part of the  
20 property that was purchased and is owned by LD Ranch?

21 A. Yes.

22 Q. And then on the right side that's Walter A.  
23 Thornhill and some others, is that part of the property  
24 that is owned by Hobble Creek -- or excuse me, by LD  
25 Ranch?

## 1 REPORTER'S CERTIFICATE

2  
3 STATE OF UTAH )  
4 COUNTY OF SALT LAKE ) Ss.  
5

6 THIS IS TO CERTIFY that the deposition of  
7 DAVID SIMPSON, witness in the foregoing deposition  
8 named, was taken before me, Katie A. Harmon, Certified  
9 Shorthand Reporter and Notary Public in and for the  
10 State of Utah, residing in Salt Lake City.

11 That the said witness was by me, before examination,  
12 duly sworn to testify the truth, the whole truth, and  
13 nothing but the truth in said cause.

14 That the testimony of said witness was by me reported  
15 in Stenotype, and thereafter caused to be transcribed  
16 into typewriting, and that a full, true, and correct  
17 transcription of said testimony so taken and transcribed  
18 is set forth in the foregoing pages, and said witness  
19 deposed and said as in the foregoing annexed deposition.  
20

21 I further certify that a reading copy of the same was  
22 delivered to the witness through this counsel,  
23 MR. CARLILE, for reading and signature, to be signed  
24 before a Notary Public, and to be returned within 30  
25 days of the date hereon.

18 I further certify that I am not kin or otherwise  
19 associated with any of the parties to said cause of  
20 action, and that I am not interested in the event  
21 thereof.

22 WITNESS MY HAND AND OFFICIAL SEAL this 2nd day of  
23 May, 2013.

24  
25 KATIE A. HARMON, RPR, CSR

# EXHIBIT B

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company;

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KIRSTEN W. MACKEY, an  
individual; DEAN MACKEY; an individual;  
and DOES 1-10

Defendants.

**DECLARATION OF LESLIE DEE  
MOWER IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
SIMPSON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Civil No. 100403908

Judge Lynn W. Davis

---

Leslie Dee Mower, hereby declares and testifies as follows:

1. I am a resident of the State of Utah over the age of 18 and make this declaration in support of Plaintiffs' Opposition to Simpson Defendants' Motion for Summary Judgment.



2. I make this declaration based on my own personal knowledge and if called upon to testify will do so consistent with the statements made herein.

3. I am a named party to this lawsuit.

4. I deny the claim that my former husband, Kenneth Dolezsar instructed or authorized David Simpson to acquire property in Hobbble Creek Canyon in his own name or in the name of any entity which he owned or controlled. I specifically did not authorize or instruct David Simpson to use my funds to acquire real property in Hobbble Creek Canyon and to title the real property in his name or in the name of an entity which he owned or controlled.

5. I never authorized or instructed Ken Dolezsar to have David Simpson title property in David Simpson's name or in the name of an entity he owned or controlled.

6. For purposes of this motion, I deny that Mackeys purchased the Mackey Parcel. Mackeys have not proved to my satisfaction they properly acquired any of the Mackey Parcel.

7. During the time of the property acquisitions in 2005 and 2006, I believe Simpson avoided contact or communication with me because he knew based on previous problems I had in dealing with Simpson that I would not approve of his representing me or my interests in any way.

8. I did not know, or have reason to know, that David Simpson was involved in the purchase of land on my behalf in Hobbble Creek Canyon. Had I found out that Simpson was involved, I would have terminated his involvement, which would have affected him financially. I believe Simpson and Dolezsar intentionally deceived me and kept me uninformed.

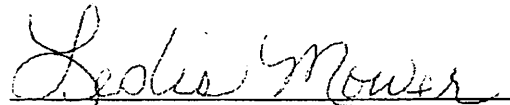
9. I did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007.

10. Simpson represented to me and my lawyers, on or after July 17, 2007, that he had transferred all the property to LD Ranch that he acquired in Hobble Creek Canyon with my personal funds or LD III's funds.

11. The representation is untrue because Simpson did not convey to me or to any of the Plaintiffs the Storr's Parcel or the Nelson Parcel.

12. I declare under the penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed this \_\_\_\_ day of April, 2014.

  
Leslie Dee Mower

# EXHIBIT C

Denver C. Snuffer, Jr. (3032)  
Steven R. Paul (7423)  
Daniel B. Garriott (9444)  
Tahnee L. Hamilton (12107)  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State Street  
Sandy, Utah 84070  
Telephone: (801) 576-1400  
Fax: (801) 576-1960

*Attorneys for Plaintiffs Leslie D. Mower, LD III, LLC and LD Ranch, LLC*

---

IN AND FOR THE FOURTH DISTRICT COURT, UTAH COUNTY  
STATE OF UTAH, PROVO DEPARTMENT

---

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company;

Plaintiffs,

vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KIRSTEN W. MACKEY, an  
individual; DEAN MACKEY; an individual;  
and DOES 1-10

Defendants.

**DECLARATION OF PAUL REEB**

Civil No. 100403908

Judge Lynn W. Davis

---

Paul Reeb, hereby declares and testifies as follows:



1. I am a resident of the State of Utah over the age of 18 and make this declaration in support of Plaintiffs' Leslie D, Mower, LD III, LLC, and LD RANCH, LLC, opposition to Simpson Defendants' Motion for Summary Judgment.

2. I make this declaration based on my own personal knowledge and if called upon to testify will do so consistent with the statements made herein.

3. I am a member of Hobbie Creek Investments, LLC, an Arizona limited liability company.

4. Hobbie Creek Investments, LLC owns property in Hobbie Creek Canyon, and has owned property in the canyon pre-dating the events of this dispute, which I understand began in approximately March ~~2005~~ *2006 PR*

5. In March of 2006, Hobbie Creek Investments was approached by David Simpson ("Simpson") to sell property in which it held a right of first refusal based on a contract it had with the Thornhills to purchase the parcel is known as the "Thornhill Parcel."

6. Prior to Simpson offering to purchase the Thornhill Parcel, Hobbie Creek Investments, LLC had acquired a right of first refusal to purchase the Thornhill Parcel from Thornhills.

7. Hobbie Creek Investments had contracted with Thornhills to purchase the Thornhill Parcel for \$1,500,000.

8. Simpson approached me, on behalf of Hobbie Creek Investments, to purchase the Thornhill Parcel, including the release of Hobbie Creek Investments' right of first refusal.

9. I told Simpson Hobbie Creek Investments would exercise its right of first refusal and purchase the Thornhill Parcel, then it would immediately convey the Thornhill Parcel to Simpson



(or his assigns). To do that, Hobbble Creek Investments required payment of \$1,750,000 and approximately 10 acres of property that adjoined its current holdings in the canyon to convey the property to Simpson.

10. Hobbble Creek Investments did not express a preference for any particular parcel to make up the 10 acres.

11. It merely expressed its need for approximately 10 acres contiguous to its other property in the canyon.


12. I informed Simpson that Hobbble Creek Investments required the property to be a buffer to prevent construction of homes or other structures near the property it already owned in the canyon.

13. Simpson proposed that Hobbble Creek Investments receive a 6.5 acre parcel included in the Crandall Parcel and 4.5 acres from the Mackey Parcel as consideration for selling the Thornhill Parcel.

14. Hobbble Creek Investments did not demand the 4.5 acres from the Mackey Parcel and would have taken any property contiguous to its own to make up the 10 total acres.

15. I declare under the penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed this 10 day of April, 2014.

  
Paul Reeb

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing **DECLARATION OF PAUL REEB** via email through JudicialLink to the following:

Craig Carlile  
Ray, Quinney & Nebeker, PC  
86 North University Ave., #430  
Provo, UT 84601-4420

*Attorneys for Defendants David R. Simpson,  
Landmark Real Estate, inc., Wood Springs, LLC,  
and Pheasant Meadows, LLC*

Sent via:

☐ Mail  
☐ Facsimile  
☐ Hand-delivery  
☒ Electronic Service via Utah Court's e-filing program

Stephen Quesenberry  
Aaron R. Harris  
Durham, Jones & Pinegar, P.C.  
RiverView Plaza, Suite 300  
4844 North 300 West  
Provo, UT 84604-5663

*Attorneys for Defendants Dean Mackey and  
Kirsten W. Mackey*

Sent via:

☐ Mail  
☐ Facsimile  
☐ Hand-delivery  
☒ Electronic Service via Utah Court's e-filing program

DATED this 10<sup>th</sup> day of April, 2014.

/s/ Steven R. Paul

1 caused Wood Springs to transfer four of the parcels of  
2 real property that had been acquired using Leslie's and  
3 LD III's funds to LD Ranch."

4 So you agree with that statement, don't you?

5 A. Yes.

6 Q. This is about three years before the lawsuit  
7 was filed. If you look on the first page, there's a  
8 stamp of when this was filed. The lawsuit was filed on  
9 November 12th of 2010.

10 A. Yes.

11 Q. At that point all of the property had been  
12 acquired with your funds?

13 A. Uh-huh.

14 Q. Other than that that was owned by Kristin  
15 Mackey was transferred in your name; correct?

16 MR. JENNINGS: Objection.

17 Q. Or in the name of LD Ranch, LLC?

18 MR. JENNINGS: Assumes facts not in evidence.

19 MR. CARLILE: Yes, go ahead.

20 A. I do not know how much property was bought with  
21 my money completely. So to that question I'd have to say  
22 I don't know.

23 Q. Do you have any reason to believe that, looking  
24 at Exhibit-2 there, that -- this one here, the map. Do  
25 you have any reason to believe that the property, that

88



1 property other than that which is outlined either in  
2 yellow or orange, was acquired with your money?

3 A. There's a possibility that there was more  
4 properties acquired.

5 Q. And what led you to that --

6 MR. JENNINGS: Craig, I need a clarification  
7 here. Because there were the four acres -- not four  
8 acres. The land that went -- on the north side that went  
9 to Hobble Creek Investments. And I think you're trying  
10 to include that. And I want a clarification on that  
11 because --

12 MR. CARLILE: That's fair. There was another  
13 piece of property, I think it's six-and-a-half acres.

14 MR. JENNINGS: Yeah, I think you're right.

15 Q. Another piece of property six-and-a-half acres  
16 was transferred to Hobble Creek Investments. Are you  
17 aware of that?

18 A. Yes.

19 Q. And were you aware that that was part of the  
20 consideration Hobble Creek Investments required in order  
21 to sell the 98.24 acres to you?

22 MR. JENNINGS: Objection, asked and answered.

23 A. I was never discussed about any manipulation,  
24 any turning over property for property or in any of the  
25 dealings that went on with the ranch. I wish I had been

1 but I wasn't.

2 Q. And Ken never told you any of that; right?

3 A. No, he did not.

4 Q. So as we sit here today, you never -- and even  
5 today you don't know what consideration was exchanged for  
6 these properties; is that correct?

7 A. I don't know what consideration. But I would  
8 go up to Hobble Creek with my husband and he would walk  
9 me and show me everything that had been bought, yes.

10 Q. But --

11 A. So I knew where the lines were. I knew  
12 actually what I owned, or I thought I owned.

13 Q. Is there anything on there, on that map that  
14 you thought you owned that you didn't receive other than  
15 what's owned by Kristin Mackey? Map meaning Exhibit-2.

16 A. I'm not sure. I really couldn't say yes or no.  
17 Because I'm looking at a map and if I go there I can show  
18 you what I was told by my husband that I owned.

19 Because I asked for 500 acres and he said,  
20 "We got the 500 acres."

21 Q. He told you 500 acres?

22 A. Yes, he did. In fact, 502 or something.

23 Q. And as you walked the property with him when he  
24 was explaining to you you had 502 acres, was there other  
25 property that you walked that isn't outlined there in

1 doing, yes.

2 Q. Is that an oral statement or is that in the  
3 general power --

4 A. It's an oral statement.

5 Q. You made that to Ken?

6 A. I made that to Ken. I made that to Bart. I  
7 made that to Bill.

8 Q. Other than that, he was managing all your  
9 business affairs while you were in prison; correct?

10 A. He was limited but, yes, the whole sole purpose  
11 was to take care of my son and to finish off the -- the  
12 ran -- the barn.

13 Q. The general power of attorney that you signed,  
14 you held that until you went to prison; correct?

15 A. I -- it appears that I did. I didn't know  
16 whether I was going or not going. And when I found out  
17 that I was going, then I had it done up.

18 Q. Who did you deliver that to?

19 A. I gave it to Ken.

20 Q. To Ken?

21 A. Yes.

22 Q. And then Ken was able to use that general power  
23 of attorney to show to people that he had authority to  
24 act on your behalf; correct?

25 A. I --

C E R T I F I C A T E

State of Utah                    )  
                                  ) ss.  
County of Salt Lake        )

I, Ann M. Love, a Registered Professional Reporter and Certified Court Reporter in and for the State of Utah, do hereby certify:

That the deposition of Leslie DeeAnn Mower, the witness in the foregoing deposition named, was taken on February 21, 2013; that said witness was by me, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause;

That the testimony of the witness was reported by me in stenotype and thereafter transcribed into typewriting and that a full, true, and correct transcription of said testimony so taken and transcribed is set forth in the preceding pages;

That a reading copy of the transcript was mailed to William T. Jennings, to be by him submitted to the witness for review and signing of the witness certificate in front of a notary public; said certificate to be returned to my office within 30 days of the date hereon.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the event thereof.

WITNESS MY HAND and OFFICIAL SEAL at Salt Lake City, Utah this 28th day of February, 2013.

\_\_\_\_\_  
Ann M. Love, RPR, CCR

# EXHIBIT E

## DURABLE POWER OF ATTORNEY

I, Leslie DeeAnn Mower, of Springville, County of Utah, State of Utah, do hereby make this durable power of attorney. This power of attorney is effective immediately.

1. Appointment of Attorney in Fact. I nominate and appoint my spouse, Kenneth G. Dolezsar, of Springville, Utah, my attorney in fact to have and exercise the powers provided by this instrument. If Kenneth G. Dolezsar shall fail or cease to serve, I appoint Robert L. Steed and Jami Ross to serve together as my agent and attorney in fact. If either should fail or cease to serve, I appoint Barry J. Steed to serve along with any remaining agent as my agent and attorney in fact. Any person to whom this durable power of attorney is presented may rely upon a certificate by my successor attorney in fact that the initial attorney in fact is unable or unwilling to serve as my attorney in fact.

2. Purpose of this Power of Attorney. I intend this to be a general power of attorney. I shall specify certain acts which my attorney in fact is authorized to do in my behalf, but this is not intended to limit the generality of this power. I intend that my attorney in fact shall have the power to exercise or perform any act, power, duty, right, or obligation whatsoever that I now have, or may hereafter acquire the legal right, power, or capacity to exercise or perform, in connection with, arising from, or relating to any person, item, transaction, thing, business, property, real or personal, tangible or intangible, or matter whatsoever.

3. To Collect, Enforce, and Manage Assets and Claims. To request, ask, demand, sue for, recover, collect, receive, and hold and possess all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interest, and retirement benefits, insurance benefits and proceeds, securities, any and all documents of title, claims, personal and real property, intangible and tangible property and property rights, and demands whatsoever, liquidated or unliquidated, as now are, or shall hereafter become, owned by, or due, owing, payable or belonging to, me or in which I have or may hereafter acquire an interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make execute and deliver for me, on my behalf, and in my name, all endorsements, acquittances, releases, receipts, or other sufficient discharges for the same.

4. To Deal With Personal Property. To lease, purchase, sell, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, sale, exchange, and acquisition of, and to accept, take, receive, and possess any

personal property whatsoever, tangible or intangible, or interest thereon, on such terms and conditions, and under such covenants, as my attorney in fact shall deem proper.

5. To Deal With Real Estate. To maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds of trust, and hypothecate, and in any way or manner deal with all or any part of any real property whatsoever, tangible or intangible, or any interest therein, that I now own or may hereafter acquire, for me, in my behalf, and in my name and under such terms and conditions, and under such covenants, as my attorney in fact shall deem proper. To sell and convey any and all land now or hereafter owned by me, and whether or not my residence under state law.

6. Funding Trusts. To transfer from time to time to the Trustee or Trustees of any revocable trust agreement created by me before or after the execution of this instrument, as to which trust I am, during my lifetime, a primary income and principal beneficiary, any or all of my cash, property or interest in property, including any rights to receive income from any source; and for this purpose to enter and remove from any safe deposit box of mine (whether the box is registered in my name alone or jointly with one or more other persons) any of my cash or property and to execute such instruments, documents and papers to effect the transfers described herein as may be necessary, appropriate, incidental or convenient.

7. To Execute Disclaimers. To execute disclaimers on my behalf under Section 2518 of the Internal Revenue Code or any comparable section of any federal or state statute, notwithstanding that the exercise of such disclaimer may benefit my attorney in fact.

8. To Deal With Securities and Brokerage Accounts. With respect to my brokerage accounts, to effect purchases and sales (including short sales), to subscribe for and to trade in stocks, bonds, options, rights, and warrants or other securities, domestic or foreign, whether dollar or non-dollar denominated, or limited partnership interests or investments and trust units, whether or not in negotiable form, issued or unissued, foreign exchange, commodities, and contracts relating to same (including commodity futures) on margin or otherwise for my account and risk; to deliver to my broker securities for my account and to instruct my broker to deliver securities from my accounts to my attorney in fact or to others, and in such name and form, including his own, as he or she may direct; to instruct my broker to make payment of moneys from my accounts with my broker, and to receive and direct payment therefrom payable to him or her or others; to sell, assign, endorse and transfer any stocks, bonds, options, rights and warrants or other securities of any nature, at any time standing in my name and to execute any documents necessary to effectuate the foregoing; to receive statements of transactions made for my account(s); to approve and confirm the same, to receive any and all notices, calls for margin, or other demands with reference to my accounts(s); and to make any and all agreements with my broker with reference thereto for me and in my behalf.

The power granted herein shall apply to brokerage accounts and any other brokers with whom I may have accounts from time to time.

My attorney in fact may vote in person, or by general or limited proxy, with or without power of substitution, with respect to any stock or other securities I may own.

I authorize my attorney in fact to execute on my behalf any powers of attorney in whatever form which may be required by any stockbroker with whom I have deposited any securities

9. To Operate or Participate in Any Business. To operate, conduct or participate in any lawful business of whatever nature for me and in my name, whether a sole proprietorship, partnership, limited liability company or corporation; to execute partnership and limited liability company agreements and amendments thereto; to change the legal form of any business; to incorporate, reorganize, merge, consolidate, recapitalize, sell, borrow against, liquidate or dissolve any business; to elect, employ or terminate officers, directors, employees, managers and agents; to delegate management responsibilities to any person; to enter into or carry out the provisions of any agreement relating to any business or business interest; to examine voting rights with respect to any business interest, including exercising voting rights with respect to stock, either in person or by proxy, and to exercise stock options; to execute an election under Subchapter S or any other provision of the Internal Revenue Code.

10. To Deal with Motor Vehicles. To apply for a Certificate of Title upon, and endorse and transfer title thereto, for any automobile, pickup, van, motorcycle or other motor vehicle, and to represent in such transfer assignment that the title to said motor vehicle is free and clear of all liens and encumbrances except those specifically set forth in such transfer assignment.

11. To Make Gifts. To make gifts of my assets to such persons and institutions as shall appear to my attorney in fact to be consistent with my prior pattern of giving, or as shall be appropriate to reduce or eliminate Federal or State estate or inheritance taxes on my estate, or to reduce the exposure of my estate to nursing home expenses. This power shall not authorize my attorney in fact to make gifts to himself or herself. In making gifts hereunder, my attorney in fact shall be mindful of transfer tax considerations, including, without limiting the generality of the foregoing, the transfer tax exclusions available under Internal Revenue Code Section 2503(b) and Section 2503(e); provided that my attorney in fact may make gifts beyond the exclusion amount if deemed advisable. If my attorney in fact makes gifts to minors, such gifts may be made directly to the minor, to a parent, guardian or next friend of the minor, under the Uniform Gifts to Minors Act or the Uniform Transfers To Minors Act or to a trust created for the benefit of the minor.



12. To Make Contracts and Give Releases. To make, receive, sign, endorse, execute, acknowledge, deliver, and possess such applications, contracts, agreements, options, covenants, security agreements, bills of sale, leases, mortgages, assignments, fire and casualty insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds, debentures, checks, drafts, bills of exchange, letters of credit, notes, stock certificates, proxies, warrants, commercial paper, receipts, proofs of loss, evidences of debts, releases, and satisfaction of mortgages, liens, judgments, security agreements and other debts and obligations and such other instruments in writing of whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

13. To Reimburse Himself or Herself. My attorney in fact may reimburse himself or herself from my funds for expenses properly incurred in acting under this instrument. Such expenses shall include, but shall not be limited to, the costs of retaining counsel to advise my attorney in fact in the conduct of his duties, and an accountant to assist in maintaining records.

14. To Deal With Bank Accounts. To deal with any bank accounts or certificates of deposit which I may own, to withdraw funds from such accounts, to pledge such accounts, and generally to exercise control over such accounts, and to establish new accounts. To execute any form, including a power of attorney, required by any bank or other financial institution in order to enable my attorney in fact to execute the powers granted under this instrument.

15. To Deal With Life Insurance Policies. To deal with life insurance policies and other products issued by life insurance companies, including annuity contracts, to change the beneficiaries, to assign the policies, to surrender and borrow against the policies and to exercise all of the incidents of ownership in any life insurance policies or annuity contracts I own.

16. To Deal With the Social Security Administration and Other Agencies. To make application on my behalf for benefits administered by the Social Security Administration or any other federal, state, or local agency and to receive Social Security and other benefits on my behalf.

17. To Arrange For My Medical Care. To have access to my medical records, to make decisions as to acceptance or rejection of medical treatment, to engage and dismiss physicians and other health care personnel, to choose where I shall receive medical treatment and to arrange for my admission to and discharge from hospitals and other places of treatment, to grant consent for or refuse consent to any medical procedure, to sign any consent or release, and to do anything in connection with my health care which I could do personally. If I shall have executed a valid Health Care Proxy this provision shall be inapplicable.

18. To Deal With Tax Matters. To represent me in all tax matters; to prepare, sign, and file federal, state, and local income tax, transfer tax, and other tax returns of all kinds, including joint returns, claims for refunds, requests for extensions of time, petitions to the Tax Court or other courts regarding tax matters, and any and all other tax-related documents, including, but not limited to, consents and agreements under Section 2032A of the Internal Revenue Code or any successor section thereto and consents to split gifts, closing agreements and Form 2848, Form 8821, and any other power of attorney or form required by the Internal Revenue Service, any state or any local taxing authority with respect to any tax year between the years 1992 and 2020; to pay taxes due, collect and make such disposition of refunds as my attorney shall deem appropriate, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service, any state, or any local taxing authority; to exercise any elections I may have under federal, state or local tax law; and generally to represent me in all tax matters and proceedings of all kinds and for all periods between the years 1992 and 2020 before all officers of the Internal Revenue Service and state and local tax authorities; to engage, compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have any interest or responsibility.

19. To Have Access To Safe Deposit Boxes. To have access at any time or times and enter any safe deposit box which I may have leased; to add property to the box or take property from the box, and to surrender possession of the box and terminate the lease.

20. To Deal With Pension Plans and Retirement Accounts. To deal with pension plans and retirement accounts of all types; to make and change beneficiary designations and payment options, and to surrender any retirement account or IRA for cash or for any other benefit payment option available under such retirement plan or IRA.

21. To Receive Mail. To enter any mail box which I shall have hired, whether at a United States Post Office or elsewhere, and to surrender the box and terminate the lease at his discretion; to sign for any certified or registered mail directed to me, and to execute any order required to forward mail to any location selected by my attorney in fact.

22. To Change My Domicile. To do all things necessary to change my legal domicile.

23. To Effect My Resignation As a Member, Officer or Fiduciary. To effect my resignation as a member or officer of any organization or entity, or as a trustee, executor, personal representative, or other fiduciary or an estate or trust, however designated.

# EXHIBIT F

## PRENUPTIAL AGREEMENT

1. Introduction. This Agreement is made this 19 day of June, 2003, in Salt Lake City, Utah, by and between Leslie DeAnn Mower and Kenneth Gerald Dolezsar.

2. Primary Purpose of Agreement. The principle purpose of this agreement is to enable each party to continue to own, retain, use and deal with his or her own separate real and personal property, acquired before or after the marriage as hereinafter set forth, as freely after their marriage as before it. This Agreement supersedes any prior understanding the parties may have had regarding their property or marital rights.

3. Factual Context for Agreement. This Agreement is made with reference to the fact that Leslie DeAnn Mower and Kenneth Gerald Dolezsar are engaged and intend to be married June 20, 2003.

REDACTED

REDACTED

REDACTED

8. Premarital Separate Property to Remain Separate Property.

Subject to Section 12, each of the parties agrees that all real and personal property now owned by the other party shall remain that party's Separate Property. If this property increases in value or generates income, the increase or income will also be Separate Property, whether or not caused in whole or in part by the time, efforts or skill of the other party. The parties' current Separate Property is listed in Exhibits "A" and "B", respectively, although each party acknowledges and agrees that any property presently owned by the other party, even if not listed on the relevant Exhibit of the other party, will be treated for all purposes of this Agreement as being the Separate Property of that party.

9. Separate Property Receipts During Marriage to be Separate

Assets. Subject to Section 12, during marriage, each party will retain exclusive ownership of his or her respective Separate Properties and all income from his or her Separate Properties likewise will be considered Separate Property. "Income" shall include, without limitation, business income (but not salary or other compensation for services), "S" corporation income, income and distributions from Neways 1 or other ownership interests in distributorships, interest, rents, royalties, and dividends. All property received after the marriage by a party as a gift, bequest or inheritance will be the Separate Property of the party receiving that property. In addition, any property which may not presently be in the name of Leslie DeAnn Mower but which is subsequently transferred to her as part of the property settlement with Thomas E.

Mower shall be the Separate Property of Leslie DeAnn Mower. It is the intent of the parties that each shall maintain separate ownership and management of his or her Separate Property during marriage. Throughout this Agreement, the words "Separate Property" shall refer exclusively to the property described on Exhibits A and B; all other property presently owned by a party; in the case of Leslie DeAnn Mower, all property received in the property settlement with Thomas E. Mower; all property received after the marriage by a party as a gift, bequest or inheritance and all income from Separate Property.

REDACTED

11. Release of Marital Rights. Subject to section 12, each party releases any rights, potential or actual, that he or she may acquire in the Separate Property of the other by reason of their marriage. This release, which applies only to the Separate Property of each party as herein defined, includes, but is not limited to, the following rights:

(a) The rights to an equitable division of Separate Property acquired before or during the marriage of the parties upon annulment, separation, or divorce.

(b) The right to claim a homestead in the Separate Property of the other.

(c) The right to a family allowance upon the death of the other.

(d) The right of election to take against the Will of the other.

(e) The rights of dower or curtesy or any comparable right granted by statute in a state where a spouse is domiciled at death or where the parties own real property.

(f) The right to claim any marital or community property interest in the other party's Separate Property, regardless of the time and effort the other devotes to that Property during marriage.

(g) The right to share in the appreciation of Separate Property during marriage.

(h) All other marital, community or quasi community property rights.

(i) Any right to receive Separate Property that might be found under an equitable division statute or law in the event of a divorce.

REDACTED



24. To Do All Necessary Things. To do, take, and perform all and every act and thing whatsoever requisite, prior, or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my attorney in fact shall lawfully do or cause to be done by virtue of this power of attorney and the right and powers herein granted.

This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to my attorney in fact.

25. Power to Remain In Effect. This power of attorney is intended to remain in full effect notwithstanding any subsequent disability or incapacity on my part.

26. Power Not Affected By Time. This power of attorney shall not expire or become stale upon the passage of time but is intended to continue in force until revoked by me. If a guardian or conservator should be appointed with authority to deal with my property, the power granted to my attorney in fact under this instrument shall terminate.

If, without actual knowledge of my death or any other circumstance which would revoke this power of attorney my attorney in fact enters into a transaction on my behalf which would have been binding upon me except for my death or other circumstance but before my attorney in fact has actual notice of such death or any other circumstance, then I or my estate will carry out the terms of the transaction in the same manner as if this power of attorney had not been terminated.

27. Counterparts and Copies Valid. I execute this power of attorney in a number of counterparts, each to be valid as an original. A certified copy of this power of attorney, if the power of attorney is recorded at the Registry of Deeds or other state or local recording office, shall be as valid as an original.

28. State Law To Govern. This power of attorney is to be construed according to the laws of the State of Utah.

29. Other Powers of Attorney Revoked. In executing this power of attorney, I hereby revoke all other powers of attorney which I have executed earlier, except such as have to do with signature powers over savings or checking accounts.

30. Duty of Attorney in Fact to Account. My attorney in fact shall account upon request to me or Robert L. Steed or such other person as Robert L. Steed shall direct in writing. If a conservator or guardian is appointed for my property my attorney in fact shall account to such conservator or guardian.

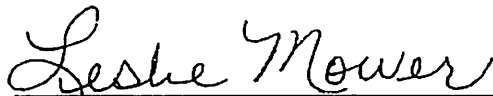
31. Power to Execute Further Powers of Attorney. My attorney in fact shall have the power to execute further powers of attorney appointing my attorney in fact or some other person.

32. Third Party Relying Upon Power of Attorney. Any person, firm, or corporation shall be entirely protected in relying upon this power of attorney or any action taken by my attorney in fact pursuant to this power of attorney, and I, or my estate in the event of my death, shall hold harmless any such person, firm, or corporation so relying upon this power of attorney or any action taken by my attorney in fact pursuant to this power of attorney. I authorize my attorney in fact to bring suit against any person, firm, or corporation which refuses to accept this power of attorney.

33. Compensation and Indemnification of My Attorney In Fact. If my attorney in fact shall be subject to any legal claim arising out of anything done or not done in accordance with this durable power of attorney, my attorney in fact shall be entitled to indemnify himself or herself from my assets, except in the event of his gross negligence or criminal misconduct. My attorney in fact shall not be held liable to any person for any action taken or not taken under this instrument, except in the event of his gross negligence or criminal misconduct. If my attorney in fact shall take any action under this power of attorney after the power of attorney has been terminated, but without knowledge of such termination, my attorney in fact shall not be liable to me or my estate, and shall be indemnified from liability by me or my estate.

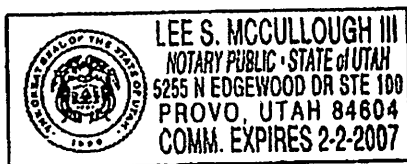
34. Grant of Power of Attorney is Revocable. I reserve the right at any time to revoke this power of attorney. If I revoke this power of attorney, I may record notice of such revocation in the County Recorder's Office of Utah County.

WITNESS my hand this 10 day of January, 2007.

  
Leslie DeeAnn Mower, Principal

STATE OF UTAH            )  
                                  : ss  
COUNTY OF UTAH        )

On the 10 day of January, 2007, personally appeared before me, Leslie DeeAnn Mower, the signer of the foregoing Durable Power of Attorney, who duly acknowledged to me that she executed the same.




  
Notary Public

REDACTED

REDACTED

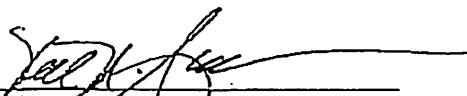
REDACTED

EXECUTED THIS 19 day of June, 2003.

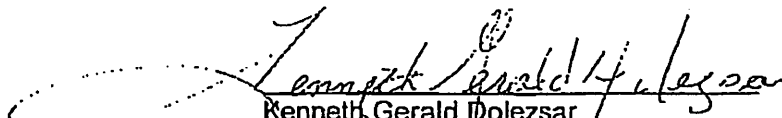
  
Leslie DeAnn Mower

APPROVED AS TO FORM AND CONTENT:

CLYDE SNOW SESSIONS & SWENSON

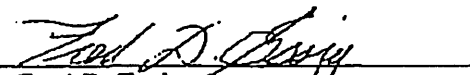
By:   
Hal N. Swenson  
Attorneys for Leslie DeAnn Mower

EXECUTED THIS 19 day of June, 2003.

  
Kenneth Gerald Dolezsar

APPROVED AS TO FORM AND CONTENT:

DIXON & ESSIG

By:   
Fred D. Essig  
Attorneys for Kenneth Gerald Dolezsar

The undersigned hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the State of Utah; that he has been retained as counsel by Leslie DeAnn Mower, one of the parties to the foregoing Agreement, and has advised and consulted with Leslie DeAnn Mower regarding her property and contractual rights and obligations under the Agreement, and has fully explained to Leslie DeAnn Mower the legal effect and consequences of the Agreement and the effect that the Agreement has upon her rights and obligations otherwise occurring as a matter of law; that Leslie DeAnn Mower, after being duly advised by the undersigned, acknowledged to the undersigned that she understood the legal effect of the Agreement and that she executed the Agreement freely and voluntarily on the 19 day of June, 2003.

DATED this 19 day of June, 2003.

CLYDE SNOW SESSIONS & SWENSON

By

  
Hal N. Swenson  
Attorneys for Leslie DeAnn Mower

The undersigned hereby certifies that he is an attorney at law, duly licensed and admitted to practice in the State of Utah; that he has been retained as counsel by Kenneth Gerald Dolezsar, one of the parties to the foregoing Agreement, and has advised and consulted with Kenneth Gerald Dolezsar regarding his property and contractual rights and obligations under the Agreement, and has fully explained to Kenneth Gerald Dolezsar the legal effect and consequences of the Agreement and the effect that the Agreement has upon his rights and obligations otherwise occurring as a matter of law; that Kenneth Gerald Dolezsar, after being duly advised by the undersigned, acknowledged to the undersigned that he understood the legal effect of the Agreement and that he executed the Agreement freely and voluntarily on the 19th day of June, 2003.

DATED this 25th day of June, 2003.

DIXON & ESSIG

By

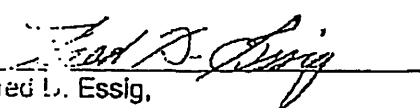
  
Fred L. Essig,  
Attorneys for Kenneth Gerald Dolezsar

EXHIBIT "A"

Kenneth Gerald Dolezsar's Property, Assets & Liabilities

SEPARATE PROPERTY OF  
KENNETH GERALD DOLEZSAR

REDACTED



SEPARATE LIABILITIES OF  
KENNETH GERALD DOLEZSAR

REDACTED

EXHIBIT "B"

Leslie DeAnn Mower's Property, Assets & Liabilities

SEPARATE PROPERTY OF  
LESLIE DEANN MOWER

REDACTED

REDACTED

SEPARATE LIABILITIES OF  
LESLIE DEANN MOWER

REDACTED

Footnote<sup>1</sup>

LTM Enterprises, Inc.  
Balance Sheet

NEWAYS INTERNATIONAL ACCOUNTING

P. C/O

REDACTED

Fiscal Year 2002

REDACTED

Footnote

inver properties, inc.

**Balance Sheet**

As of December 31, 2002

REDACTED

Mower Properties, INC.

REDACTED



Mower Properties, INC.  
Profit & Loss

REDACTED

Mower Properties, INC.  
Profit & Loss

REDACTED

---

Profit & Loss

REDACTED

# EXHIBIT G

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

-----  
LESLIE D. MOWER, an individual, )  
LD III, LLC, a Utah limited ) Case No. 100403908  
liability company; LD RANCH, )  
LLC, Utah limited liability )  
company; )  
Plaintiffs, ) Judge Davis  
vs. )  
Deposition of:  
DAVID R. SIMPSON, an individual; ) DEAN MACKEY  
LANDMARK REAL ESTATE, INC., a )  
Utah corporation; WOOD SPRINGS, )  
LLC, Utah limited liability )  
company; PHEASANT MEADOWS, LLC, )  
a Utah limited liability )  
Company; KRISTIN W. MACKEY, an )  
individual; DEAN MACKEY, an )  
individual; and DOES 1-10, )  
Defendants. )  
-----

AUGUST 15th 2013

9:06 a.m.

Location: Law Offices of Bailey & Jennings  
584 South State Street  
Orem, Utah 84058

Reporter: Katie Harmon, RPR, CSR

1 surrender the property ownership due to the fact that it  
2 could be adjoined with some additional properties and an  
3 additional building lot could be had, not only on my  
4 property but on an adjoining piece. I wanted to keep it  
5 with that possibility in the future.

6           So he wasn't given ownership but he was given  
7 an easement on my property. And I believe he has some  
8 of the then Thornhill property. And I'm not sure if he  
9 has any Crandall. I don't know the specifics but just  
10 general that's what he's got.

11           Q. So you're thinking of doing an 11 lot  
12 subdivision. How in your mind was that going to be  
13 funded?

14           A. Dave said he had the funds to do that or he  
15 had the means.

16           Q. Did you consider any funds for the purchase of  
17 any of the property?

18           A. No, it was my effort -- my contribution was  
19 obtaining the property and obtaining permission and the  
20 agreements of those then property owners to surrender  
21 their ownership. That was my portion of the investment  
22 of obtaining those properties.

23           Q. When you were planning on doing this  
24 subdivision were you going to live on one of the lots?

25           A. Yes, I was.

1 A. I wasn't happy.

2 Q. What did you tell him?

3 A. I can't recall the details.

4 Q. Did David Simpson either personally or from  
5 one his entities pay you any money?

6 A. Not directly, no.

7 Q. When you say "not directly?"

8 A. No, we -- our compensation was in lieu of cash  
9 and it was in the form of privacy on the piece that we  
10 now have. Rather than us build where the ranch now  
11 sits, we decided that we wanted to be where we're at,  
12 that we wanted to have peace and privacy without the  
13 additional property owners that were up on our plateau.

14 Q. Did David Simpson to your knowledge, either  
15 personally or from one his entities, ever pay any money  
16 to your wife?

17 A. No.

18 Q. We've talked about the land -- and I  
19 understand you now own about 64 acres in the canyon.  
20 Besides that property, does your wife own any other land  
21 that's titled in her name only?

22 A. I hope not.

23 Q. That is a good answer.

24 (Deposition Exhibit No. 15 was received into evidence.)

25 Q. You've been handed what's been marked as

1 Q. And on the front page of that it talks about  
2 water rights, water shares, 3.5 shares of stock in  
3 Springville Irrigation Company. Is that possibly the  
4 water --

5 A. That we received.

6 MR. CARLISLE: Lacks Foundation. Speculation.

7 Q. Do you know if that's the water that you own?

8 A. The numbers are the same. I couldn't tell you  
9 specifically what it is.

10 (Deposition Exhibit No. 17 was received into evidence.)

11 Q. You've been handed what's been marked as  
12 Exhibit 17. It's a warranty deed from Wood Springs LLC  
13 to Kristin W. Mackey.

14 Have you seen this document before?

15 A. I may have.

16 Q. Under what circumstances would you have seen  
17 it?

18 A. I've gotten tons of paperwork so I may have  
19 seen it.

20 Q. We've talked about earlier that you were  
21 entitling property in Kristin's -- why you were titling  
22 property in your wife's name only. Would that be the  
23 reason this is just to her?

24 A. Well, it goes hand-in-hand with what we've  
25 done historically.



1 Q. And if I represented to you that this  
2 description on the second page is for the Storrs  
3 property, the 12 and the 7 acres that you received that  
4 was next to your 49 acres, would that make sense to you?

5 A. I would have to believe you. I don't know  
6 because I don't what the descriptives mean.

7 Q. Do you recall if you or your wife furnished  
8 money for this land?

9 A. Well, it shows that we gave \$10 so we must  
10 have.

11 Q. Well, but that's a standard thing on all  
12 warranty deeds. Do you recall --

13 A. Legally if it says that we must have.

14 Q. I'm not asking what the document says.

15 A. I don't know. I don't know the -- I don't  
16 know the details.

17 Q. You don't recall?

18 A. No.

19 Q. Are you aware of -- well, forget that. At the  
20 time that you received the property -- well, let me back  
21 up. You owned 49 acres and whether this is the deed or  
22 not, and I'm representing it is.

23 You did receive property that was owned by  
24 Storrs previously, correct?

25 A. That's correct.

1 Q. At that time you received that property what  
2 was your relationship with Storrs?

3 A. It was friendly but confrontational at the  
4 same time.

5 Q. What do you mean by that?

6 A. His son and my son were friends. I'd asked  
7 him to sell the property, he didn't want to. He had a  
8 little angst because I got the property that he wanted.  
9 So there was a bit of competition but it was basically  
10 friendly competition, if you will.

11 Q. When you said you got the property he wanted,  
12 what property is that?

13 A. The Nelson piece. He wanted to buy the rest  
14 of the property so he could build where I now reside.

15 Q. Do you recall when you got -- and I'd  
16 represent this is the deed. But do you recall,  
17 yourself, when you got the property that Storrs had  
18 owned who deeded it to your wife? I'm just trying to  
19 understand if you knew who you got it from.

20 A. I don't know the details.

21 Q. So would you be aware of why Wood Springs  
22 first got the property before it came to you?

23 A. Storrs would not sell me the property and I  
24 believe that Dave Simpson was able to talk him into  
25 selling the property to him and a more reasonable

1 purchase amount.

2 Q. Again, you don't remember if you paid money  
3 for this property or not?

4 A. I didn't pay anything for it.

5 Q. Were you aware of where the funds came from to  
6 purchase it?

7 A. I have no idea.

8 Q. In your mind at that time why did you receive  
9 the property?

10 A. In lieu of the profits that we would have  
11 shared and divided by developing the 11 acre lot -- or  
12 the 11 building lots.

13 Q. When you say "we would have shared," who is  
14 the "we?"

15 A. Between David and I.

16 Q. So was it your understanding that this  
17 property was coming from David Simpson?

18 A. No, not from David Simpson himself. No.

19 Q. Who was your understanding --

20 A. At that time the property then was owned by  
21 Ms. Mower and it was my understanding that Ken gave  
22 David the permission to buy that property to compensate  
23 us for our efforts in putting the properties now  
24 together that they had purchased.

25 Q. How did you arrive at that understanding?

1 A. We've talked to Ken. We've talked to Dave.

2 Q. When did you --

3 A. It came up in conversation.

4 Q. Do you recall when it was you talked with Ken?

5 A. I can't give you the details, it was a long  
6 time ago.

7 Q. Do you recall what that conversation with Ken  
8 was?

9 A. I couldn't tell you what it was.

10 Q. Do you recall what the conversation with  
11 David Simpson was?

12 A. We had a lot of conversations but I can't give  
13 you details. I just don't have that kind of memory.

14 Q. I understand, I have to ask however.  
15 (Deposition Exhibit No. 18 was received into evidence.)

16 Q. You've been handed what's been marked as  
17 Exhibit 18. It is a warranty deed from Pheasant  
18 Meadows, LLC to Kristin W. Mackey.

19 Do you have an understanding of what Pheasant  
20 Meadows is?

21 A. No. You know, between Pheasant Meadows and  
22 Wood Springs or Wood Cross or whatever the names are, I  
23 really didn't give a rat's rear end. Sorry about the  
24 abruptness of language.

25 You know, the only thing that I really wanted

1 to see is us have our privacy up in that property that  
2 we were told that we would have if we were to build our  
3 home on that piece rather than where the barn is.

4 Q. So were you ever aware that Pheasant Meadows,  
5 LLC was associated with David Simpson?

6 A. I had to make that assumption.

7 Q. If I represented to you that this is the  
8 warranty deed that conveyed the 12 acres that was owned  
9 by Olsen that you now own as part of your 64, would that  
10 make sense to you?

11 A. I would have to believe you.

12 Q. What was your relationship with the Olsens who  
13 owned property there?

14 A. It was contentious.

15 Q. What do you mean "it was contentious?"

16 A. They wanted to use my property as their  
17 easement that was not a descriptive because it was a  
18 family-owned property rather than those that are using  
19 the easement that were non-related. So there was some  
20 legal issues of them crossing our property to have  
21 access to their own property when they had access  
22 through a different route but more difficult.

23 Q. Did you ever approach Olsen about selling to  
24 you?

25 A. We did.

1 Q. What was their response?

2 A. They denied wanting to sell to me.

3 Q. Where you ever in a lawsuit with Olsens?

4 A. Yes.

5 Q. How did that lawsuit come out?

6 A. It had to do with the easement.

7 Q. What was the result of that lawsuit?

8 A. I really doesn't know the details. All I know  
9 is that it was resolved and dropped and we now have that  
10 piece of property.

11 (Deposition Exhibit No. 19 was received into evidence.)

12 Q. You've been handed what's been marked as  
13 Exhibit 19. It's a Right-of-use easement. We talked  
14 earlier about that. There is an easement granted to the  
15 Reebbs for some property.

16 A. Uh-huh.

17 Q. Have you seen this document?

18 A. Yes, that commemorates that agreement.

19 Q. Where it's between Kristin Wynn Mackey and  
20 Hobble Creek Investments, LLC, do you recognize what  
21 Hobble Creek Investments is?

22 A. I can only assume that is a company that is  
23 identified directly to Hal Reeb.

24 Q. But you don't know that for a fact?

25 A. I don't know that.

## 1 REPORTER'S CERTIFICATE

2

3 STATE OF UTAH )  
4 ) Ss.  
5 COUNTY OF SALT LAKE )

6

7 THIS IS TO CERTIFY that the deposition of  
8 Dean Mackey, witness in the foregoing deposition named,  
9 was taken before me, Katie A. Harmon, Certified  
10 Shorthand Reporter and Notary Public in and for the  
11 State of Utah, residing in Salt Lake City.

12 That the said witness was by me, before examination,  
13 duly sworn to testify the truth, the whole truth, and  
14 nothing but the truth in said cause.

15 That the testimony of said witness was by me reported  
16 in Stenotype, and thereafter caused to be transcribed  
17 into typewriting, and that a full, true, and correct  
18 transcription of said testimony so taken and transcribed  
19 is set forth in the foregoing pages, and said witness  
20 deposed and said as in the foregoing annexed deposition.

21 I further certify that a reading copy of the same was  
22 delivered to the witness through this counsel,  
23 MR. QUESENBERRY, for reading and signature, to be signed  
24 before a Notary Public, and to be returned within 30  
25 days of the date hereon.

26 I further certify that I am not kin or otherwise  
27 associated with any of the parties to said cause of  
28 action, and that I am not interested in the event  
29 thereof.

30 WITNESS MY HAND AND OFFICIAL SEAL this 30th day of  
31 August, 2013.

32

33

34

35

KATIE A. HARMON, RPR, CSR

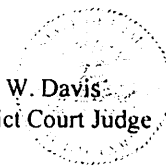
## ADDENDUM 6



The Order of Court is stated below:

Dated: June 23, 2015  
02:22:32 PM

/s/ Lynn W. Davis  
District Court Judge



**ANDREW V. WRIGHT (11071)**  
**AARON R. HARRIS (12111)**  
**DURHAM, JONES & PINEGAR, P.C.**  
3301 North Thanksgiving Way, Suite 400  
Lehi, Utah 84043  
Telephone (801) 375-6600  
[awright@djplaw.com](mailto:awright@djplaw.com)  
[aharris@djplaw.com](mailto:aharris@djplaw.com)  
*Attorneys for Defendants Dean Mackey and Kirsten W. Mackey*

IN THE FOURTH DISTRICT COURT, UTAH COUNTY  
PROVO DEPARTMENT, STATE OF UTAH

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; LD  
RANCH, LLC, a Utah limited liability  
company;

Plaintiffs,  
vs.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a  
Utah corporation; WOOD SPRINGS,  
LLC, a Utah limited liability company;  
PHEASANT MEADOWS, LLC, a Utah  
limited liability company; KRISTIN W.  
MACKEY, an individual; DEAN MACKEY;  
and individual; and DOES 1-10;

Defendants.

**RULING ON MACKEY DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT  
AND ORDER**

Case No. 100403908

Judge Lynn W. Davis

On April 15, 2014, Kristin W. Mackey and Dean Mackey (hereinafter the "Mackey Defendants") filed a Motion for Summary Judgment and Memorandum in Support of Summary Judgment (hereinafter the "Motion"). On May 9, 2014, Plaintiffs filed a

Memorandum in Opposition, and on May 30, 2014, the Mackey Defendants filed their Reply Memorandum. On September 16, 2014, and again on April 22, 2015, the Court received oral arguments from counsel. At the conclusion of the April 22, 2015 hearing, the Court took the matter under advisement. Having carefully considered the facts and legal arguments set forth in the memoranda and the oral arguments of counsel, the current law of the case, and the applicable procedural and substantive Utah law on the matters addressed in the Motion, the Court hereby rules and orders as follows:

Procedural History

1. Plaintiffs filed their Complaint against the Mackey Defendants on November 11, 2010.
2. The Complaint includes the following claims against the Mackey Defendants: Fourth Cause of Action for Aiding and Abetting Breach of Fiduciary Duty, Sixth Cause of Action for Unjust Enrichment, Seventh Cause of Action for Conspiracy and Eighth Cause of Action for Breach of Contract. The Complaint also included two specific remedy requests as causes of action: Ninth Cause of Action for Constructive Trust and Tenth Cause of Action for Equitable Lien.
3. On August 21, 2014, this Court entered its Ruling on Simpson Defendants' Motion for Summary Judgment and Order, in which it dismissed all of Plaintiffs' claims against the following Defendants: David R. Simpson, Landmark Real Estate, Inc., Wood Springs, LLC, and Pheasant Meadows, LLC.
4. On April 7, 2015, this Court entered its Order Denying Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment.

### Legal Standards

1. The Utah Rules of Civil Procedure provide that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. Rule 56(c). As explained by the Utah Supreme Court, "[o]nce the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact." *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 31, 54 P.3d 1054 (citations omitted). Also, "[t]he nonmoving party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations and citation omitted); *see also Thornock v. Cook*, 604 P.2d 934, 936 (Utah 1979).
2. Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure requires that a party opposing a motion for summary judgment set forth a "verbatim restatement of each of the moving party's facts that is controverted" and, for each one, the "opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." In *Stevens v. LaVerkin City*, the Utah Court of Appeals recognized that "[f]ailure to produce acceptable evidence demonstrating a genuine issue of material fact will result in a grant of

summary judgment." 2008 UT App 129, ¶ 18, 183 P.3d 1059. This is because Rule 7(c)(3)(A) states that "[e]ach fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party."

3. At the April 22, 2015 hearing, Plaintiffs' counsel represented to the Court that case materials that were not cited as part of the non-moving party's briefing could still be relied upon to controvert facts set forth in the moving party's memorandum. At the time, Plaintiffs' counsel was unable to cite any case law to support such a position. At the conclusion of the hearing, the Court granted Plaintiffs ten additional days to submit case law to support their position; no case law was ever submitted. The Court finds Plaintiffs' position to be incorrect, unsupported, and contrary to governing Utah law, given that "[a] district court is not obligated to comb the record to determine whether a genuine issue as to any material fact exists to prevent summary judgment. Rather, it is the nonmoving party's burden to demonstrate that such a conflict exists." *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, 208 P.3d 1077.
4. In Utah, the "law of the case" doctrine provides that "a decision made on an issue during one stage of a case is binding in successive stages of the same litigation." *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995) (citing *Plumb v. State*, 809 P.2d 734, 739 (Utah 1990)). As explained by the Supreme Court, "[t]he doctrine was developed in the interest of economy and efficiency to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on

matters previously decided in the same case." *Id.* (citations omitted). Under this doctrine, "a court is justified in refusing to reconsider matters it resolved in a prior ruling in the same case for the reasons of efficiency and consistency." *Id.* at 1038. The policy underlying this doctrine "rests on good sense and the desire to protect both the court and parties against the burdens of repeated reargument by indefatigable diehards." *Id.* at 1039 (quotations and citations omitted).

The Mackey Defendants' Arguments in Support of their Request for Summary Judgment

1. The Mackey Defendants adopted the following previously-asserted facts set forth in the Simpson Defendants' Motion for Summary Judgment: ¶¶ 1-10, 12-13(b), 13(d)-19. The Mackey Defendants adopted the Simpson Defendants' facts ¶¶ 11, 13(c), and 13(e) with additional "amendments or corrections." Also, the Mackey Defendants asserted thirteen additional undisputed facts within their "Additional Facts" section.
2. The Mackey Defendants presented the following arguments to the Court in support of their Motion for Summary Judgment:<sup>1</sup>
  1. The statute of limitations barred Plaintiffs' three tort claims because Plaintiffs knew of the existence of their causes of action no later than August 27, 2006 (when the last transaction at issue took place) and did not file their Complaint until November 10, 2010 (over four years later). The Mackey Defendants also argued that neither the discovery rule nor the equitable tolling rule applied to any of Plaintiffs' causes of action.
  2. Because Plaintiffs could not prove their breach of fiduciary duty claim against

the Simpson Defendants, they had no basis to support a derivative aiding and abetting claim against the Mackey Defendants (which would necessarily be tied to the existence of an actual breach of a fiduciary duty).

3. Because the Mackey Defendants provided consideration in return for the land that they received, there was no basis for a claim of unjust enrichment (or for the derivative remedies of construction trust and equitable lien).

4. Because no evidence could be presented that the Mackey Defendants performed one of more unlawful, overt acts, no basis for the conspiracy claim existed.

3. In response to the Mackey Defendants' asserted facts, the Plaintiffs (1) incorporated their responses set forth in their opposition to the Simpson Defendants' Motion for Summary Judgment, (2) admitted the Mackey Defendants' additional facts ¶¶ 1, 5, and 7-13, (3) disputed the Mackey Defendants' amended facts ¶¶ 11, 13(c), and 13(e) and additional facts ¶¶ 2, 3, and 4 without citing to any record evidence, (4) denied additional fact ¶ 6 by referencing a MLS listing, and (5) set forth 16 "Additional Relevant Facts."

4. Of the 16 Additional Relevant Facts, ¶¶ 1, 2, 4, and 5 reference only Plaintiffs' Complaint or legal argument within prior-filed memoranda as support for the assertions therein. Also, ¶¶ 3, 6, and 7 rely on the Declaration of Leslie Dee Mower.<sup>2</sup> Finally, ¶¶ 8-16 rely on the Declaration of Paul Reeb.

5. The Plaintiffs argued that the discovery rule should toll the statute of limitations, that

a sufficient dispute of material fact existed to preserve the aiding and abetting claim, that the Mackey Defendants failed to pay for the land that they received (because the method that was used to secure that land was not the only method that could have been used), and that the method used in transferring the land at issue to the Mackey Defendants was evidence of a conspiracy. At the April 22, 2015 hearing, the Plaintiffs also argued that the Mackey Defendants had not actually moved for dismissal of the constructive trust and equitable lien claims and, therefore, even if summary judgment was granted, dismissal would not be final (due to the remaining existence of these two claims).

Dismissal of Breach of Contract Claim against Mackey Defendants

1. On October 9, 2014, the Court entered its Order Dismissing (Without Prejudice) Plaintiff's Breach of Contract Claim; in this order, the Court dismissed the Plaintiffs' claim for breach of contract against the Mackey Defendants. This Order resolved one of the Plaintiffs' claims that the Mackey Defendants addressed in their Motion for Summary Judgment

Application of Law of the Case Doctrine

1. After the Mackey Defendants submitted this Motion for decision, but before the Court held any oral argument on the Motion, the Court granted the Simpson Defendants' Motion for Summary Judgment. Within that Ruling, the Court noted:  
  
The Plaintiffs' response to each of the [Simpson Defendants'] 19 undisputed facts involves admissions, admissions in part, or total denials. They then set forth counter claimed facts. Notably, the Plaintiffs make no citation to any

deposition, no citation to any affidavit, and no citation to any exhibit.

The rule requires more than a denial or unsupported factual allegations; to defeat a motion for summary judgment, the opposing party must explain the basis for denial by providing citation to relevant materials. As the Plaintiffs have failed to cite any material to support the denials, the Simpson Defendants' facts are deemed admitted.

Plaintiffs' attempt to incorporate additional facts by reference to the Declaration of Leslie Dee Mower is likewise futile as the declaration is inadmissible because it consists of nothing but statements directly contradicted by her prior deposition testimony and unsubstantiated opinions and conclusions.

The Court then adopted the Simpson Defendants' asserted facts as undisputed.

1. The Court ruled that "the claims of ... breach of fiduciary duties, unjust enrichment and conspiracy were barred within four years or each closing, the latest of which would have been August 27, 2010. Accordingly, Plaintiffs' claims are barred by the statute of limitations."
2. Since Plaintiffs' disputes of the Mackey Defendants' asserted facts were deficient in the same manner as the disputes of the Simpson Defendants' asserted facts, the Court's ruling on the undisputed nature of the Simpson Defendants' asserted facts applies equally to the Mackey Defendants' asserted facts. The Court adopts the Mackey Defendants' asserted facts as undisputed for the purposes of this summary judgment ruling.
3. Given that the Mackey Defendants relied on the same facts that the Court already determined are undisputed when it ruled on the Simpson Defendants' Motion for Summary Judgment, the Court's ruling on the applicability of the statute of limitations to the claims made against the Simpson Defendants applies equally to the Mackey Defendants' statute of limitations argument within their Motion for



Summary Judgment.

Ruling

***The Equitable Discovery Rule***

1. Because the Court has adopted the law of the case as to the application of the statute of limitations, Plaintiffs' remaining claims against the Mackey Defendants are untimely. Plaintiffs claim, however, that, despite the untimely nature of the claims, the equitable discovery rule tolled the limitations period until November 15, 2007 (the date that Ken Doleszar passed away). Plaintiffs claim that Mr. Doleszar and Mr. Simpson undertook deceptive and conscious efforts to keep Plaintiffs uninformed of the specific property transactions.
2. In *Berenda v. Langford*, the Utah Supreme Court clearly and specifically set forth that a "plaintiff can avoid the full operation of the discovery rule by making a prima facie showing of fraudulent concealment and *then* demonstrating that given the defendant's actions, a reasonable plaintiff would not have discovered the claim earlier." 914 P.2d 45, 51 (Utah 1996) (emphasis added). Later in the same case, the Supreme Court reiterated this requirement, stating that "a plaintiff *must* make a prima facie showing of fraudulent concealment" before demonstrating that she could not have discovered the claim earlier. *Id.* at 54 (emphasis added).
3. In *Yazd v. Woodside Home Corp.*, the Utah Supreme Court identified "[t]he three elements of fraudulent concealment ... (1) there is a legal duty to communicate information, (2) the nondisclosed information is known to the party failing to disclose, and (3) the nondisclosed information is material." 2006 UT 47, ¶ 35, 143

P.3d 283; see also *Jones & Trevor Marketing, Inc. v. Lowry*, 2010 UT App 113, ¶ 16, n. 15, 233 P.3d 538.

4. Plaintiffs have neither addressed the elements of fraudulent concealment nor made any attempt to demonstrate that they can even allege facts that satisfy the elements of fraudulent concealment.
5. Plaintiffs' sole attempt to advance any facts in support of her claim that the equitable discovery rule applies is the attachment of Ms. Mower's Declaration (as Exhibit 5 to the Opposition Memorandum). However, this Declaration does not contain facts sufficient to create a prima facie fraudulent concealment claim. Most of the Declaration is irrelevant to the inquiry; ¶¶ 9 and 10 are the only paragraphs that even remotely address any facts related to fraudulent concealment. In ¶ 9, Plaintiffs rely upon apparent silence of others; however, the Utah Supreme Court has clearly stated that, "in no case ... is mere silence or failure to disclose sufficient in itself to constitute fraudulent concealment." *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, 156 ¶ 44, P.3d 806.
6. In ¶ 10, Ms. Mower states that Simpson purportedly represented one false fact to her. However, a bare assertion that Simpson (an individual that is neither Dean Mackey nor Kristin Mackey) made one statement to her that she had all of the land that she paid for does not create a prima facie case for fraudulent concealment. Plaintiffs make no representation that Ms. Mower relied (reasonably or otherwise) on the information conveyed by Simpson.
7. In *Colosimo*, the Utah Supreme Court recognized that a plaintiff that fails "to allege

any affirmative acts of concealment” has no ability to seek equitable tolling. *Id.* at ¶ 45. Plaintiffs have not identified what information any Defendant “actively concealed” that was required to move forward with their claims. Plaintiffs cannot rely upon a conclusory statement and unsupported innuendo to demonstrate that they are entitled to equitable tolling of the statutes of limitations. See *Russell Packard Development, Inc. v. Carson*, 2005 UT 14, ¶ 39, 108 P.3d 741 (stating that judgment as a matter of law that a claim is untimely is appropriate when “the facts underlying the allegation of fraudulent concealment are so tenuous, vague, or insufficiently established that the claim fails as a matter of law”).

8. Because Plaintiffs have failed to present evidence sufficient to even approach meeting the elements of fraudulent concealment, Plaintiffs' claim for equitable tolling of the statute of limitations based upon fraudulent concealment fails as a matter of law.
9. Furthermore, there is no dispute that Plaintiffs had record notice and constructive knowledge of the transactions. The conveyance documents were recorded and gave notice to each Plaintiff (and the world) of each transaction long before any purported lie by Simpson. Additionally, Ms. Mower had the ability and means to discover the causes of action prior to November 2007. Specifically: (1) the money for the purchases and transactions came from Ms. Mower's and Dolezsar's joint checking account; (2) Ms. Mower stated she had knowledge of the funds leaving her account; and (3) she walked the property with Dolezsar prior to his death. These facts all establish that Plaintiffs had (at the very least) constructive knowledge of any

claims prior to November 2007.

10. Therefore, all of Plaintiffs' remaining claims against the Mackey Defendants are untimely and are barred by the U.C.A. § 78B-2-307, which is the applicable statute of limitations.

11. Based upon this ruling, the Plaintiffs' claims are all dismissed, with prejudice and as a matter of law, based upon the application of Utah's statute of limitations.

### ***Aiding & Abetting Breach of Fiduciary Duty***

1. The Court has already dismissed the claim for breach of fiduciary duty against the Simpson Defendants. Without an actionable breach of a duty, there can be no actionable aiding and abetting claim. See *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45 (1996) (describing the elements of an aiding and abetting claim). Also, Plaintiffs provided no evidence to counter the undisputed assertion that the Mackey Defendants had no knowledge that (1) Mr. Simpson owed any duties to Plaintiffs or that (2) Mr. Simpson breached any of those duties. Based upon the *Russell/Packard Dev., Inc. v. Carson* case, such a deficiency is fatal to an aiding and abetting claim. 2003 UT App 316, ¶ 33, 78 P.3d 616.
2. Therefore, even if the Plaintiffs' claim for aiding and abetting a breach of fiduciary duty were timely, it still would fail as a matter of law. This claim is dismissed, with prejudice, as a matter of law.

### ***Unjust Enrichment, Equitable Lien, Constructive Trust***

1. Plaintiffs' argument in opposition to summary judgment related to their claim for unjust enrichment is that the Mackey Defendants did not pay for the property that

they received. However, Plaintiffs have overlooked the consideration that the Mackey Defendants gave up, including an easement.

2. When considering an unjust enrichment claim, "[i]t is not enough that a benefit was conferred on the defendant, rather, the enrichment to the defendant must be unjust in that the defendant received a true windfall or 'something for nothing.'" *Richards v. Brown*, 2009 UT App 315, ¶ 29, 222 P.3d 69.
3. The Mackey Defendants released valuable easement rights and executed a contract to transfer an additional 12-14 acres to Plaintiffs in exchange for the land that they received.
4. Plaintiffs admit, yet fail to recognize, that the Mackey Defendants' 4.5 acres were given as part of the purchase price for the Plaintiffs' to acquire the Thornhill Parcel. There is no dispute that the 4.5 acres were part of the transaction that benefited the Plaintiffs. The declaration by Mr. Reeb that Plaintiffs included within their opposition materials actually confirms the Mackey Defendants' position and asserted fact that value was exchanged (rather than placing it in dispute) because the declaration makes clear that ten total acres were required as part of the purchase price for the Thronhill Parcel. The Mackey Defendants' 4.5 acres went to Hobble Creek Investments as a part of this required price. Whether or not the transactions could have speculatively been negotiated and executed a different way does not change the value that the Mackey Defendants' easement provided the Plaintiffs. Hobble Creek Investments, LLC demanded ten contiguous acres to their property; the Mackey Defendants gave their 4.5 acres of valuable land to satisfy part of this

requirement. This directly benefitted the Plaintiffs, and the transaction is proof of consideration that forecloses the unjust enrichment claim.

5. Because there is no proof that the Mackey Defendants received something for nothing, and there is undisputed proof that the Mackey Defendants traded valuable rights in exchange for the property that they received, the Plaintiffs' claim for unjust enrichment fails as a matter of law.
6. Also, although Plaintiffs claimed at the April 22, 2015 hearing that the Mackey Defendants did not move for summary judgment on the constructive trust and equitable lien claims, such an assertion was incorrect. Argument section III within the Mackey Defendants' initial Memorandum in Support of their Motion for Summary Judgment clearly states: "The Court should dismiss Plaintiffs' claim for Unjust Enrichment (as well as for the derivative remedies of Constructive Trust and Equitable Lien)."
- (Mackey Defendants' Memo. at p. 12.) The Mackey Defendants also cited two Utah cases—*Rawlings v. Rawlings*, 2010 UT 52, ¶ 16, 240 P.3d 754 and *D.U. Co., Inc. v. Jenkins*, 2009 UT App 195, ¶ 4, 216 P.3d 360—that support the position that both the constructive trust and equitable lien remedies are specifically derivative of and reliant upon a claim for unjust enrichment.
7. Plaintiffs never challenged the legal assertion or the application of either case in their Memorandum in Opposition; therefore, the Court adopts the Mackey Defendants' position that the constructive trust and equitable lien claims are reliant upon the existence of a claim for unjust enrichment (both because that position is correct and because the Plaintiffs offered no dispute of that position). Because the

unjust enrichment claim is both untimely and fails as a matter of law, the claims for equitable lien and constructive trust also fail (as they have no claim for which they may provide a remedy).

8. Plaintiffs' claims for unjust enrichment, equitable lien, and constructive trust are dismissed, with prejudice, as a matter of law.

### ***Conspiracy***

1. Plaintiffs' entire argument that the conspiracy claim should survive is that, since the transaction could have been completed in some other way, there must be some conspiracy involved.
2. To support a claim for conspiracy, a party "must also prove that the alleged conspirators performed one or more unlawful, overt acts." *Peterson v. Delta Air Lines*, 2002 UT App 56, ¶ 12, 42 P.3d 1253.
3. Plaintiffs have not even offered evidence of any unlawful act that any defendant performed, let alone the Mackey Defendants.
4. Therefore, like all of the other claims at issue, even if the conspiracy claim were not untimely, it would still fail as a matter of law.
5. Plaintiffs' claim for conspiracy is dismissed, with prejudice, as a matter of law.

### **Order of Dismissal**

1. Plaintiffs' remaining claims against the Mackey Defendants—aiding and abetting breach of fiduciary duty, unjust enrichment, constructive trust, equitable lien, and conspiracy—are dismissed, with prejudice, as a matter of law.
2. All of Plaintiffs' claims set forth in their Complaint have been dismissed.

3. This order constitutes the final order and judgment from which any appeal may be taken in this case (pursuant to Rule 3 of the Utah Rules of Appellate Procedure).

ENTERED BY THE COURT AS INDICATED BY THE SEAL AT THE TOP OF THE FIRST  
PAGE

-----END OF ORDER-----



**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 1<sup>st</sup> day of June 2014, she caused a true and correct copy of the above-captioned proposed ruling to be delivered to the following via the Court's electronic notification system:

Denver Snuffer Craig Carlile  
Steven Paul  
William Jennings

/s/ Staci Robison-Reith

Because the breach of contract claim was already resolved through a separate order, the Court does not address the Mackey Defendants' arguments related to the dismissal of that claim.

This is the same Declaration of Leslie Dee Mower that Plaintiffs included in their opposition to the Simpson Defendants' Motion for Summary Judgment.

## ADDENDUM 7

The Order of Court is stated below:

Dated: April 07, 2015  
05:43:37 PM

/s/ Lynn W. Davis  
District Court Judge



Craig Carlile (0571)  
**RAY QUINNEY & NEBEKER P.C.**  
86 North University Avenue, #430  
Provo, Utah 84601-4420  
Telephone: (801) 342-2400

*Attorneys for Defendants David R. Simpson, Landmark Real Estate, Inc.,  
Wood Springs, LLC and Pheasant Meadows, LLC.*

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH, PROVO DEPARTMENT

LESLIE D. MOWER, an individual; LD III,  
LLC, a Utah limited liability company; and LD  
RANCH, LLC, a Utah limited liability  
company,

Plaintiff,

v.

DAVID R. SIMPSON, an individual;  
LANDMARK REAL ESTATE, INC., a Utah  
corporation; WOOD SPRINGS, LLC, a Utah  
limited liability company; PHEASANT  
MEADOWS, LLC, a Utah limited liability  
company; KRISTIN W. MACKEY, an  
individual; DEAN MACKEY, an individual;  
and DOES 1-10,

Defendants.

**ORDER DENYING PLAINTIFFS'  
MOTION TO RECONSIDER RULING  
ON SIMPSON DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Civil No: 100403908

Judge: Lynn W. Davis

The above-entitled matter came on regularly for hearing before the above-entitled Court on March 26, 2015 on Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment. The Plaintiffs were represented by their counsel of record, Denver C. Snuffer, Jr., Steven R. Paul and Daniel B. Garriott of Nelson, Snuffer, Dahle & Poulsen, P.C. and by William T. Jennings. The Defendants David R. Simpson, Landmark Real Estate, Inc., Wood Springs, LLC and Pheasant Meadows, LLC were represented by their counsel of record, Craig

000997

Carlile of Ray Quinney & Nebeker. The Defendants Kristin W. Mackey and Dean Mackey were represented by their counsel Aaron R. Harris of Durham Jones & Pinegar.

The Court having considered the memoranda and the arguments of counsel, the Court being fully advised in the premises and good cause appearing, and according to the Court's oral ruling made at the hearing,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Reconsider Ruling on Simpson Defendants' Motion for Summary Judgment is denied.

IT IS SO ORDERED.

**\*\*In accordance with the Utah State District Courts E-filing Standard No. 4, and URCP Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.\*\***

APPROVED AS TO FORM:

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

/s/ Denver C. Snuffer, Jr.  
Denver C. Snuffer, Jr.  
*Attorneys for Plaintiffs*

DURHAM JONES & PINEGAR

/s/ Aaron R. Harris  
Aaron R. Harris  
*Attorneys for Defendants Kristin W. Mackey and Dean Mackey*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of March, 2015, I mailed the foregoing **ORDER  
DENYING PLAINTIFFS' MOTION TO RECONSIDER RULING ON SIMPSON  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to the following:

Denver C. Snuffer, Jr.  
Stephen R. Paul  
Daniel B. Garriott  
Tahnee L. Hamilton  
NELSON, SNUFFER, DAHLE & POULSEN, P.C.  
10885 South State  
Sandy, Utah 84070

Stephen Quesenberry  
Aaron R. Harris  
Durham Jones & Pinegar  
Riverview Plaza, Suite 300  
4844 North 300 West  
Provo, Utah 84604-5663

/s/ Rhonda Bartholomew

Rhonda Bartholomew

1322941

